No. 3829

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVID B. DRISKILL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

FILED
APR 1 - 1922
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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SPENCER B. PUGH, Esquire, 107 Monihon Building, Phoenix, Arizona,

Attorney for Plaintiff in Error.

THOMAS A. FLYNN, Esquire, United States Attorney, JOHN H. LANGSTON, Esquire, Assistant United States Attorney, Federal Building, Phoenix, Arizona,

Attorneys for Defendant in Error. [2*]

C–1323—PHOENIX.

In the District Court of the United States for the District of Arizona.

Indictment.

VIOL. Sec. 3, Tit. 2, Act of Oct. 28, 1919, Possessing and Transporting Intoxicating Liquor.

United States of America,
District of Arizona,—ss.

In the District Court of the United States in and for the District of Arizona, at the April Term Thereof, A. D. 1921.

The grand jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oath present, that DAVID S. DRISKILL, on the 23d day of April, 1921, and within the said District of Arizona, did wilfully and unlawfully possess certain intoxicating liquor fit for beverage purposes, to wit, seven pints of whiskey, nine pints of tequila, and one gallon of

*Page-number appearing at foot of page of original certified Transcript of Record.

intoxicating liquor the exact character of which is to the grand jurors unknown, he, the said David B. Driskill, then and there having no lawful permit to possess the said intoxicating liquor; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, on their oath aforesaid, do further present, that DAVID B. DRISKILL, on the 23d day of April, A. D. 1921, and within the said District of Arizona, did wilfully and unlawfully transport, in a manner and by means to the grand jurors unknown, certain intoxicating liquor fit for beverage purposes, to wit, seven pints of whiskey, nine pints of tequila, and one gallon of intoxicating liquor the exact character of which is to the grand jurors unknown, from a certain house located at number twenty-two hundred and forty-eight West Washington Street, in the City of Phoenix, and District of Arizona, to and into a certain barn situated across the alley from the said twenty-two hundred and forty-eight West Washington Street at the intersection of said alley and Twenty-third Avenue, in said City of Phoenix and District of Arizona, he, the said David B. Driskill, then and there having no lawful permit to transport the said intoxicating liquor; [3] contrary to the form of the statute in such case made and provided and against *and* peace and dignity of the United States of America.

THOMAS A. FLYNN,
United States Attorney for the District of Arizona.

[Endorsements]: C–1323. In the District Court of the United States for the District of Arizona. United States of America vs. David B. Driskill. Indictment. A True Bill. E. T. Collings, Foreman of the Grand Jury.

Witnesses Examined Before the Grand Jury:

Frank Smith, Ella Davis,
E. B. Sisk, Mrs. W. H. Luttner.

Presented to the Court in the presence of the grand jury by their foreman, and filed this 27th day of April, A. D. 1921.

C. R. McFALL,
Clerk.
By Clyde C. Downing,
Chief Deputy Clerk. [4]

Regular April Term, 1921—Wednesday, April 27, 1921—Phoenix.

At a regular term, to wit, the April Term, 1921, of the United States District Court for the District of Arizona, held in the courtroom of the said Court in the Federal Building, in the City of Phoenix, State and District of Arizona, on Wednesday, the 27th day of April, A. D. 1921, at the hour of 9:30 o'clock A. M. Honorable WILLIAM H. SAWTELLE, District Judge of the United States for the District of Arizona, Presiding. Present: JOSEPH P. DILLON, United States Marshal; THOMAS A. FLYNN, United States Attorney; JOHN H. LANGS-

TON, Assistant United States Attorney; C. R. McFALL, Clerk; E. C. SMITH, Bailiff; OSCAR TEMPLE, Bailiff, and EDWARD G. CARLSON, Bailiff.

Court is duly opened by Bailiff Smith, according to law.

(Excerpt from Minutes.)

No. C–1323—(PHOENIX).

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant.

Minutes of Court—April 27, 1921—Arraignment and Plea.

The United States Attorney being present on the part of the Government, comes now the defendant herein, David B. Driskill, in open court, in person and by counsel, Spencer B. Pugh, and being arraigned at the bar of this court on the indictment herein, charging him, the said David B. Driskill, with violation of Section 3 of Title 2 of the Act of October 28, 1919, possessing and transporting intoxicating liquor, which said indictment is read to the said defendant and a copy thereof with the endorsements thereon is handed to him. The defendant states that his true name is as set forth in the said indictment, and on being called to plead thereto

he states that he is not guilty, which plea of NOT GUILTY is ordered entered.

(Same Date.)

Minutes of Court—April 27, 1921—Order Setting Cause for Trial.

* * * * * * * *

IT IS ORDERED that the above case be and the same hereby is set for trial April 28th, 1921.

* * * * * * * *

[5]

Regular April Term, 1921—Thursday, April 28, 1921—Phoenix.

At a regular term, to wit, the April, 1921, Term of the United States District Court for the District of Arizona, held in the courtroom of the said court in the Federal Building, in the City of Phoenix, State and District of Arizona, on Thursday, the 28th day of April, A. D. 1921, at the hour of 9:30 o'clock A. M. Honorable WILLIAM H. SAWTELLE, District Judge of the United States for the District of Arizona, Presiding. Present: JOSEPH P. DILLON, United States Marshal; THOMAS A. FLYNN, United States Attorney; JOHN H. LANGSTON, Assistant United States Attorney; C. R. McFALL, Clerk; E. C. SMITH, Bailiff; OSCAR TEMPLE, Bailiff; EDWARD G. CARLSON, Bailiff.

Court is duly opened by Joseph P. Dillon, United States Marshal, according to law.

(Excerpt from Minutes.)

No. C–1323—(PHOENIX).

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Minutes of Court—April 28, 1921—Order Continuing Case for Term.

IT IS ORDERED that this case be and the same is hereby continued for the term on a showing made by the defendant.

* * * * * * * *

[6]

In the District Court of the United States in and for the District of Arizona.

No. C–1323.

UNITED STATES OF AMERICA
vs.
DAVID B. DRISKILL,
Defendant.

Petition for Restoration of Property and Restraining Order.

To the Honorable District Court of the United States in and for the State of Arizona:

Now comes David B. Driskill, the defendant in

the above-entitled cause, petitioning the Court, and says that he is a citizen of the United States and of the State of Arizona; that on or about the 23d day of April, 1921, your petitioner and his family were the owners of and in the exclusive possession of a certain dwelling-house and outbuildings, chicken-house, and other buildings and yards, same being and constituting a frontage of 150 feet on West Washington Street, Phoenix, Arizona, and running back a distance of about 165 feet to an alley, said dwelling-house being occupied at said time by petitioner and his family as a home and dwelling-house, and said other parts of said premises being upon said property and accessory thereto and a part of the home and premises of your petitioner, said house being numbered as No. 2248, West Washington Street, in said city; that at said time your petitioner and his family, of which he is the head, were the owners of certain other premises in the rear of the north of said above-described property, consisting of a dwelling-house and other outbuildings, including a barn, storehouse and garage immediately adjoining the premises hereinbefore first described [7] and which said barn, storehouse and garage was occupied and used jointly by and between petitioner and a tenant to whom he had rented the dwelling-house on said adjoining premises, said storehouse being used by and accessible alike by said tenants as a storehouse and by the petitioner and his family, same being the barn and family storehouse used at said time by the petitioner and used in connection with his dwelling

and upon his own land and premises and that of his wife and family, and same constituting their homestead, as well as being continuously accessible by and used by said tenants, as an outbuilding and storehouse, jointly with your petitioner.

That on or about said date certain persons and officers, including one Mr. Sisk, special agent of the Department of Justice of the United States, one Daniel J. Lucy, a police officer of the City of Phoenix, and one Fred Weage, Assistant United States Marshal, and others under their charge and direction, unlawfully and without warrant or authority so to do, and without any search-warrant or any warrant whatsoever for said premises, as required by law, entered the aforesaid premises, dwelling-house, garage, barn and storeroom of petitioner on his premises, hereinbefore described, over the protest and without the consent of this petitioner or any other occupant thereof or person thereon or having authority therein or thereabout, and took, carried away and removed from the said premises, to wit, the said barn and storeroom in connection with the same premises and the dwelling-house of petitioner, as petitioner is informed and believes, the following described property, to wit; seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquor, and other liquors, together with receptacles in which same were contained, and other property, the nature of which [8] is unknown to your petitioner.

That the acts aforesaid of said officers was in

violation of the 4th and 5th amendments to the Constitution of the United States and that the said property so unlawfully seized is now held by the United States Marshal, J. B. Dillon, and by the office of United States District Attorney and United States Clerk, District of Arizona, as petitioner is informed and verily believes, as evidence against the petitioner as defendant in the above-entitled cause, and that the said officers of the Government propose, intend and are threatening to and about to use the same property, so unlawfully seized in violation of the constitutional rights of this petitioner, as evidence against him in said cause.

That the said property was unlawfully seized, as aforesaid, in violation of Article IV of the Constitution of the United States, commonly known as the Bill of Rights, guaranteeing citizens of the United States against unreasonable searches and seizures, and the same is proposed and intended to be used, as petitioner is informed and believes, to, in effect, compel this petitioner to be a witness against himself, as aforesaid, in violation of the Fifth Amendment to the Constitution of the United States, providing that no person shall be compelled in a criminal case to be a witness against himself.

That unless the Court shall order that the said persons and officers, or persons now having said property in their possession, shall restore the same from whence it was so unlawfully taken, and order that the same officers and agents of the United States Government refrain from using the said property, or any information obtained by them

through said unlawful search and seizure, against this [9] petitioner, the constitutional rights of this petitioner have and will be violated as aforesaid.

WHEREFORE, your petitioner prays that the United States District Attorney, United States Marshal, Clerk of this Court, and all of said officers and persons who participated in said unlawful search and seizure or have now in their possession any of said property or knowledge gained from said unlawful search or seizure, be forever restrained from using the same or any part or parcel thereof in any manner against this petitioner in this cause, and that said officers and persons now having said property in their possession be ordered and directed to restore and replace the same at the place and condition from whence same was so unlawfully seized and taken.

DAVID B. DRISKILL,
Petitioner.

State of Arizona,
County of Maricopa,—ss.

David B. Driskill, being first duly sworn, on his oath deposes and says, that he is the petitioner above named; that he has read the foregoing petition by him subscribed and that the same is true in substance and in fact of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those, he believes it to be true.

DAVID B. DRISKILL.

Subscribed and sworn to before me this twenty-fourth day of October, 1921.

[Seal] SPENCER B. PUGH,
Notary Public.

My commission expires 10/30/22. [10]

[Endorsements]: No. C–1323. United States Court, District of Arizona. U. S. of America vs. David B. Driskill, Defendant. Motion to Restore Property and for Restraining Order. Filed Oct. 24, 1921. C. R. McFall, Clerk. By P. D. Madden, Deputy.

Copy rec'd this 24 day of October, 1921.

THOMAS A. FLYNN,
By J. M. Holub. [11]

In the District Court of the United States in and for the District of Arizona.

PHOENIX—1323–C.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Motion to Strike Petition for Restoration of Property.

Comes now the United States of America, plaintiff, herein, by Thomas A. Flynn, United States Attorney for the District of Arizona, and moves the Court to strike defendant's petition for restora-

tion of property from the files herein, and for grounds of said motion, says:

I.

That the said petition as appears upon its face fails to disclose sufficient reason for the granting of the relief prayed therein.

II.

That said petition fails to disclose that the petitioner is the owner of, or claims any interest in, the property which he seeks in said petition to have restored to him.

III.

That the said petition shows upon its face that the barn, storehouse or garage from which it is alleged said property was taken by the officers was not upon or a part of the premises of which the defendant has exclusive possession.

IV.

That it appears from said petition that the said barn, storehouse and garage was located upon premises which defendant had rented to a tenant and which said barn, storehouse and garage were continuously accessible to and used by said tenants as an outbuilding and storehouse.

THOMAS A. FLYNN,
United States Attorney for the District of Arizona.

[12]

[Endorsements]: No. Phoenix 1323-C. In the District Court of the United States for the District of Arizona. United States of America vs. David B. Driskill, Defendant. Motion to Strike Petition for

Restoration of Property. Filed October 27, 1921. C. R. McFall, Clerk. By P. D. Madden, Deputy. Thomas A. Flynn, United States Attorney. [13]

In the District Court of the United States in and for the District of Arizona.

PHOENIX—1323–C.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Answer of Petition for Restoration of Property and for Restraining Order.

COMES NOW the United States of America, by Thomas A. Flynn, United States Attorney for the District of Arizona, and answering the statements and allegations contained in the petition for restoration of property and for restraining order, heretofore filed by the defendant in this cause, admits, alleges and denies, as follows, to wit:

Admits that the petitioner is a citizen of the United States and of the State of Arizona; that on or about the 23d day of April, 1921, the petitioner and his family were the owners of and in the exclusive possession of a certain dwelling-house and outbuilding, chicken-house, and other buildings and yards, same being and constituting a frontage of 150 feet on West Washington Street, Phoenix, Arizona, and running back a distance of about 165 feet

to an alley, said dwelling-house being occupied at said time by petitioner and his family as a home and dwelling-house, and said other parts of said premises being upon said property and accessory thereto and a part of the home and premises of the petitioner, said house being numbered as No. 2248 West Washington Street, in said Phoenix, Arizona, and that at the said time the petitioner and his family were also the owners of certain other premises in the rear of the north of said above-described property, consisting of a dwelling-house and other outbuildings, including a barn, storehouse and garage immediately adjoining the premises hereinbefore first described.

Denies that the said dwelling-house and other outbuildings, to wit, garage last above described were occupied and used jointly by and between petitioner and a tenant to whom he had rented the dwelling-house on said adjoining premises; denies that the said garage last above described was the family storehouse of the defendant or his family; and alleges the facts to be that the [14] said dwelling and garage last above described were by the defendant rented, at a stipulated monthly rental, to W. H. Luttner, and Mrs. W. H. Luttner, and were then and there occupied by the said Luttner and wife as their home; and that said dwelling-house and garage were then and there under the exclusive control of the said Luttner and wife as tenants.

Denies that on or about the said date, certain persons and officers, including one E. B. Sisk, a

special agent of the Department of Justice of the United States, one Daniel J. Lucey, a police officer of the City of Phoenix, one Fred Weage, Assistant United States Marshal, and others under their charge and direction, unlawfully and without warrant or authority so to do, and without any search-warrant or any warrant whatsoever for said premises, as required by law, entered the above-mentioned dwelling and garage of petitioner on his premises, over the protest of the petitioner; and allege the facts to be that the above-mentioned officers did search the garage or storeroom on the premises so rented by the said Luttners from the said Driskill, as aforesaid, with the full consent and permission of the occupant of the premises, to wit, Mrs. W. H. Luttner, who was then and there in charge of said premises and the above-mentioned garage or storeroom, and further alleges that the said E. B. Sisk, with the aid of other officers, did find in and remove from the above-mentioned garage seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquors, and other liquors, together with receptacles in which same were contained, a certain trunk and other property, particularly empty whiskey flasks.

Denies that the said acts of said E. B. Sisk and other officers in aid of said E. B. Sisk were in violation of the 4th and 5th Amendments to the Constitution of the United States.

Admits that the said property so seized is now held by J. P. Dillon, United States Marshal for the District of Arizona, and that the same is intended

to be used by the United States Attorney as evidence in the trial of the defendant in the above-entitled cause. [15]

Denies that the said property was unlawfully seized in violation of Article IV of the Constitution of the United States or in violation of any article of the Constitution of the United States. And denies that the same in proposed and intended to be used in effect or otherwise to compel the said petitioner to be a witness against himself. Denies that the use of the said property as evidence is in violation of the 5th or any Amendment to the Constitution of the United States.

WHEREFORE, the said United States Attorney, having fully answered said petition, prays the Court to deny the petition of the defendant for restoration of property and restraining order by him filed in this cause.

THOMAS A. FLYNN,
United States Attorney for the District of Arizona.

United States of America,
District of Arizona,—ss.

E. B. Sisk, being first duly sworn, on his oath deposes and says that he has read the above and foregoing answer to the petition for restoration of property and for restraining order, and knows the contents of said petition and answer; that the allegations in said petition which are denied in said answer are untrue; that all the matters and things alleged in said answer are true of his own knowledge, except the matters and things stated therein

upon information and belief, and as to those matters he believes them to be true.

[Seal] E. B. SISK.

Subscribed and sworn to before me this the 26th day of October, A. D. 1921.

PATRICK D. MADDEN,

[16]

Deputy Clerk of the United States District Court.

[Endorsements]: Phoenix—No. 1323—C. In the District Court of the United States for the District of Arizona. United States of America vs. David B. Driskill. Answer to Petition for Restoration of Property and for Restraining Order. Filed October 27, 1921. C. R. McFall, Clerk. By P. D. Madden, Deputy. Thomas A. Flynn, United States Attorney [17]

C–1323—PHOENIX.

UNITED STATES OF AMERICA,

Plaintiff,

against

DAVID B DRISKILL,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant is guilty of the first count, the defendant not guilty of the second count of said indictment.

W. L. JAMES,

Foreman.

[Endorsements]: No. C–1323—Phoenix. United States District Court, District of Arizona. U. S. A., Plaintiff, vs. David B. Driskill, Defendant. Verdict. Filed Oct. 29, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [18]

UNITED STATES OF AMERICA.

In the District Court of the United States for the District of Arizona.

At the October Term, 1921, held at Phoenix, Arizona, in said District, on November 2d, 1921. Honorable JEREMIAH NETERER, District Judge, Specially Assigned, Presiding.

Case No. C–1323 (PHOENIX.)

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Judgment and Commitment.

The defendant, David B. Driskill, is present in person, and with his counsel, Spencer B. Pugh, Esquire.

The United States Attorney for the District of Arizona is present on behalf of the United States. And this being the time heretofore fixed for passing Judgment on the defendant aforesaid, the said defendant is now duly informed by the Court of the nature of the indictment found against him for the

crime of Violating Section 3 of Title 2 of the Act of October 28, 1919,—possessing intoxicating liquor, —of his arraignment at the bar of this court on said indictment; of his plea of not guilty on said arraignment, and of his trial before a jury of twelve men, and of the verdict of GUILTY of the first count of the said indictment; and not guilty of the second count.

The said defendant is now asked if he has any legal cause to show why judgment should not be pronounced against him; and no sufficient cause being shown or appearing to the Court, the Court renders its Judgment as follows:

That, whereas you, David B. Driskill, having been duly convicted in this Court of the crime aforesaid, it is found by the Court that you are so guilty of said crime.

It is therefore ORDERED, ADJUDGED AND DECREED, and the Judgment and Sentence of the Court is that as a punishment for the said offense you shall pay a fine of Five Hundred Dollars and costs amounting to the sum of Ninety-Four Dollars, and in default of the payment of the said fine you shall stand committed.

The said defendant is now remanded to the custody of the United States Marshal for said District, to be by him delivered into the custody of the proper officer of said ———

And it is further ORDERED, that a certified copy of this Judgment shall be sufficient Warrant for the said Marshal to take, keep and safely deliver the said defendant into the custody of the proper of-

ficers of said ———, and a sufficient Warrant for the officers of said ——— to keep and imprison the said ———.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify the foregoing to be a true and correct copy of the Judgment made and entered on the minutes of said District Court in the above-entitled action, and of the whole thereof.

Attest: My hand and seal of said Court, this 5th day of November, A. D. 1921.

[Seal] C. R. McFALL,
Clerk.
By Clyde C. Downing,
Chief Deputy Clerk. [19]

In the District Court of the United States in and for the District of Arizona.

No. 1323.

UNITED STATES OF AMERICA
vs.
DAVID B. DRISKILL,
Defendant.

Motion for New Trial.

Now comes David B. Driskill, defendant in the above-entitled cause, by his attorney, and moves the Court to set aside the verdict rendered herein

and to grant a new trial, upon the following grounds, to wit:

I.

The verdict is contrary to the law of the case.

II.

The verdict is not supported by the evidence in the case.

III.

The Court upon the trial of the case admitted evidence offered by the United States, which said evidence was incompetent.

IV.

The Court erred in refusing to direct a verdict of not guilty at the close of the Government's case.

V.

The Court erred in refusing to direct a verdict of not guilty at the close of all the evidence.

SPENCER B. PUGH,
Attorney for Defendant. [20]

[Endorsements]: No. 1323. In the United States District Court in and for the State of Arizona. United States of America vs. David B. Driskill, Defendant. Motion for New Trial. Filed Nov. 2d, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. Spencer B. Pugh, Attorney for Defendant. [21]

Regular October Term, 1921—Wednesday, November 2, 1921—Phoenix.

At a regular term, to wit, the October Term, 1921, of the United States District Court for the District of Arizona, held in the courtroom of the said Court in the Postoffice Building in the City of Phoenix, State and District of Arizona, on Wednesday, the 2d day of November, A. D. 1921, at the hour of 9:30 o'clock A. M. Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington (Specially Assigned), Presiding. Present: JOSEPH P. DILLON, United States Marshal; THOMAS A. FLYNN, United States Attorney; JOHN H. LANGSTON, Assistant United States Attorney; JOHN H. MARTIN, Assistant United States Attorney; JOSEPH M. HOLUB, Assistant United States Attorney; CLYDE C. DOWNING, Chief Deputy Clerk; GEORGE H. BLANCHARD, Bailiff; OSCAR F. TEMPLE, Bailiff; FRANCIS NOLAN, Crier.

Court is duly opened by the United States Marshal according to law.

Excerpt from Minutes.

* * * * * * * *

No. C-1323 (PHOENIX).

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant.

Minutes of Court—November 2, 1921—Order Denying Motion for New Trial.

The United States Attorney for the District of Arizona appearing on behalf of the Government; Spencer B. Pugh, Esquire, appearing for and on behalf of the defendant,—

IT IS ORDERED, upon motion for a new trial having been fully argued and considered, that the said motion be and the same is hereby denied. [22]

In the District Court of the United States for the District of Arizona.

PHOENIX—1323-C

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant.

Bill of Exceptions No. 1.

BE IT REMEMBERED, that on the 28th day of October, 1921, at a term of the court held in Phoenix, Arizona, in and for the District of Arizona, before his Honor, Jeremiah C. Neterer, District Judge, presiding, the issues being joined in the above-stated cause between the United States of America, as plaintiff, and David B. Driskill, as defendant, came on to be tried before the said Judge and a jury, and the United States of America ap-

pearing by Mr. J. H. Langston, Assistant United States Attorney, and the said defendant appearing in person and by Spencer B. Pugh, as his attorney;

And the defendant having theretofore filed in said cause his petition for restoration of property, and for a restraining order, in words and figures as follows, to wit:

"In the District Court of the United States, in and for the District of Arizona.

No. 1323–C.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Petition for Restoration of Property and Restraining Order.

To the Honorable District Court of the United States in and for the State of Arizona: [23]

Now comes David B. Driskill, the defendant in the above-entitled cause, petitioning the Court, and says that he is a citizen of the United States and of the State of Arizona; that on or about the 23d day of April, 1921, your petitioner and his family were the owners of and in the exclusive possession of a certain dwelling-house and outbuildings, chicken-house, and other buildings and yards, same being and constituting a frontage of 150 feet on West Washington Street, Phoenix, Arizona, and running back a distance of about 165 feet to an

alley, said dwelling-house being occupied at said time by petitioner and his family as a home and dwelling-house, and said other parts of said premises being upon said property and accessory thereto and a part of the home and premises of your petitioner, said house being numbered as No. 2248 West Washington Street, in said city; that at said time your petitioner and his family, of which he is the head, were the owners of certain other premises in the rear of the north of said above-described property, consisting of a dwelling-house and other out buildings, including a barn, storehouse and garage immediately adjoining the premises hereinbefore first described and which said barn, storehouse and garage was occupied and used jointly by and between petitioner and a tenant to whom he had rented the dwelling-house on said adjoining premises, said storehouse being used by and accessible alike by said tenants as a storehouse and by the petitioner and his family, same being the barn and family storehouse used at said time by the petitioner and used in connection with his dwelling and upon his own land and premises and that of his wife and family, and same constituting their homestead, as well as being continuously accessible by and used by said tenants, as an outbuilding and storehouse, jointly with your petitioner.

That on or about said date certain persons and officers, including one Mr. Sisk, special agent of the Department of Justice [24] of the United States, one Daniel J. Lucy, a police officer of the City of Phoenix, one Fred Weage, Assistant United

States Marshal, and others under their charge and direction, unlawfully and without warrant or authority so to do, and without any search-warrant or any warrant whatsoever for said premises, as required by law, entered the aforesaid premises, dwelling-house, garage, barn and storeroom of petitioner on his premises, hereinbefore described, over the protest and without the consent of this petitioner, or any other occupant thereof or person thereon or having authority therein or thereabout, and took, carried away and removed from the said premises, to wit, the said barn and storeroom in connection with the same premises and the dwelling-house of petitioner, as petitioner is informed and believes, the following described property, to wit: Seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquor, and other liquors, together with receptacles in which same were contained, and other property, the nature of which is unknown to your petitioner.

That the acts aforesaid of said officers was in violation of the 4th and 5th Amendments to the Constitution of the United States, and that the said property so unlawfully seized is now held by the United States Marshal, J. P. Dillon, and by the office of the United States District Attorney and United States Clerk, District of Arizona, as petitioner is informed and verily believes, as evidence against the petitioner as defendant in the above-entitled cause, and that the said officers of the Government propose, intend and are threatening to and about to use the same property, so unlawfully seized

in violation of the Constitutional rights of this petitioner, as evidence against him in said cause.

That the said property was unlawfully seized, as aforesaid, in violation of Article IV of the Constitution of the United States, commonly known as the Bill of Rights, guaranteeing citizens [25] of the United States against unreasonable searches and seizures, and the same is proposed and intended to be used, as petitioner is informed and believes, to, in effect, compel this petitioner to be a witness against himself, as aforesaid, in violation of the Fifth Amendment to the Constitution of the United States, providing that no person shall be compelled in a criminal case to be a witness against himself.

That unless the Court shall order that the said persons and officers, or persons now having said property in their possession, shall restore the same from whence it was so unlawfully taken, and order that the same officers and agents of the United States Government refrain from using the said property, or any information obtained by them through said unlawful search and seizure, against this petitioner, the constitutional rights of this petitioner have and will be violated as aforesaid.

WHEREFORE, your petitioner prays that the United States District Attorney, United States Marshal, Clerk of this Court, and all of said officers and persons who participated in said unlawful search and seizure or have now in their possession any of said property or knowledge gained from said unlawful search and seizure, be forever restrained from using the same or any part or parcel thereof

in any manner against this petitioner in this cause, and that said officers and persons now having said property in their possession be ordered and directed to restore and replace the same at the place and condition from whence same was so unlawfully seized and taken.

(Signed) DAVID B. DRISKILL,
Petitioner.

State of Arizona,
County of Maricopa,—ss.

David B. Driskill, being first duly sworn, on his oath, deposes and says that he is the petitioner above named; that he [26] has read the foregoing petition by him subscribed and that the same is true in substance and in fact of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those, he believes it to be true.

(Signed) DAVID B. DRISKILL.

Subscribed and sworn to before me this twenty-fourth day of October, 1921.

(Signed) ————————,
Notary Public.

My commission expires ———."

AND, the United States of America, having filed its answer to said petition in words and figures as follows, to wit:

"In the District Court of the United States, in and for the District of Arizona.

PHOENIX—1323-C.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Answer to Petition for Restoration of Property and for Restraining Order.

COMES NOW the United States of America, by Thomas A. Flynn, United States Attorney for the District of Arizona, and answering the statements and allegations contained in the petition for restoration of property and for restraining order, heretofore filed by the defendant in this cause, admits, alleges and denies as follows, to wit:

Admits that the petitioner is a citizen of the United States and of the State of Arizona; that on or about the 23d day of April, 1921, the petitioner and his family were the owners of and in the exclusive possession of a certain dwelling-house and outbuilding, chicken-house and other buildings and yards, same being and constituting a frontage of 150 feet on West Washington [27] Street, Phoenix, Arizona, and running back a distance of about 165 feet to an alley, said dwelling-house being occupied at said time by petitioner and his family as a home and dwelling-house, and said other parts of said premises being upon said property and acces-

sory thereto and a part of the home and premises of the petitioner, said house being numbered as No. 2248 West Washington Street in said Phoenix, Arizona, and that at the said time the petitioner and his family were also the owners of certain other premises in the rear of the north of said above-described property, consisting of a dwelling-house and other outbuildings, including a barn, storehouse and garage immediately adjoining the premises hereinbefore first described.

Denies that the said dwelling-house and other outbuildings, to wit, garage last above described were occupied and used jointly by and between petitioner and a tenant to whom he had rented the dwelling-house on said adjoining premises; denies that the said garage last above described was the family storehouse of the defendant or his family; and alleges the facts to be that the said dwelling and garage last above described were by the defendant rented at a stipulated monthly rental to W. H. Luttner and Mrs. W. H. Luttner, and were then and there occupied by the said Luttner and wife as their home; and that said dwelling-house and garage were then and there under the exclusive control of the said Luttner and wife as tenants.

Denies that on or about the said date, certain persons and officers, including one E. B. Sisk, a special agent of the Department of Justice of the United States, one Daniel J. Lucey, a police officer of the City of Phoenix, one Fred Weage, Assistant United States Marshal, and others under their charge and direction, unlawfully and without war-

rant or authority so to do, and without any search-warrant or any warrant whatsoever for said premises, as required by law, entered the above-mentioned dwelling and [28] garage of petitioner on his premises, over the protest of the petitioner; and allege the facts to be that the above-mentioned officers did search the garage and storeroom on the premises so rented by the said Luttners from the said Driskill, as aforesaid, with the full consent and permission of the occupant of the premises, to wit, Mrs. W. H. Luttner, who was then and there in charge of said premises and the above-mentioned garage or storeroom, and further alleges that the said E. B. Sisk, with the aid of other officers, did find in and remove from the above-mentioned garage seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquors, and other liquors, together with receptacles in which same were contained, a certain trunk and other property, particularly empty whiskey flasks.

Denies that the said acts of said E. B. Sisk and other officers in aid of said E. B. Sisk were in violation of the 4th and 5th Amendments to the Constitution of the United States.

Admits that the said property so seized is now held by J. P. Dillon, United States Marshal for the District of Arizona, and that the same is intended to be used by the United States Attorney as evidence in the trial of the defendant in the above-entitled cause.

Denies that the said property was unlawfully seized in violation of Article IV of the Constitution of the United States or in violation of any

article of the Constitution of the United States. And denies that the same is proposed and intended to be used in effect or otherwise to compel the said petitioner to be a witness against himself. Denies that the use of the said property as evidence is in violation of the 5th or any amendment of the Constitution of the United States.

WHEREFORE the said United States Attorney, having fully answered said petition, prays the Court to deny the petition of the defendant for restoration of property and restraining order [29] by him filed in this cause.

(Signed) THOMAS A. FLYNN,
United States Attorney for the District of Arizona.

United States of America,
District of Arizona,—ss.

E. B. Sisk, being first duly sworn, on his oath deposes and says that he has read the above and foregoing answer to the petition for restoration of property and for restraining order, and knows the contents of said petition and answer; that the allegations in said petition which are denied in said answer are untrue; that all the matters and things alleged in said answer are true of his own knowledge, except the matters and things stated therein upon information and belief, and as to those matters he believes them to be true.

(Signed) E. B. SISK.

Subscribed and sworn to before me this 26th day of October, A. D. 1921.

[Seal] (Signed) PATRICK D. MADDEN,
Deputy Clerk of the United States District Court.

AND, the said petition not having been ruled upon by the Court at the time of the beginning of the trial and the swearing of the jury to try said cause, but the ruling upon said petition and the answer thereto having been by the Court deferred to the trial of said cause,—

THEREUPON, the following evidence was introduced in said cause:

Testimony of E. B. Sisk, for the Government.

E. B. SISK, being sworn as a witness testified as follows:

("My name is E. B. Sisk. I am a special agent, Department of Justice, and was such during the month of April, last. I know the defendant Driskill, and know where he lived during the month [30] of April. I was at his place on April 21st. Special Agent Wilkey, of the Department of Justice, Police Officer D. J. Lucey were in my car, and another car accompanying us had in it that day Deputy United States Marshal Fred Weage, Police Inspector J. J. McGrath, and Police Officer Joe Balz.

Q. And just tell what you did when you went down to his house.

Mr. PUGH.—Now, I object, if the Court pleases, unless it is shown that there was a search-warrant for what they did there, the question is a broad one, and might involve something, or bring to the attention of this Court something for which there was no search-warrant.

The COURT.—Answer the question.

(Testimony of E. B. Sisk.)

A. Approaching the block—

The COURT.—Not what you did when you were approaching the house; when you got to the house, we will find out.

A. Approaching the block we drove into—I drove into the alley which would lead me to the rear of the house, of the defendant's house, and driving up the alley directly to the rear of his house, I stopped at his, at the back end of his garage, which opens on to the alley. As I stopped I saw the defendant. As I stopped at the back of his premises, I noticed the doors of his garage open, and also the doors open of the garage across the alley and north of his premises.

Mr. PUGH.—Now, if the Court pleases, I move to strike out the use of the words "his premises," unless it is shown that this witness knows those premises.

The COURT.—Motion denied, let the answer stand for now.

The WITNESS.—(Continuing answer.) When I first looked into the garage as I came to a stop in the car, I looked across into the garage across the alley from the defendant's premises, and the defendant was stooping, had hold of a trunk, and in the act [31] of pushing it back into a corner. He arose and walked out of the garage across the alley and started into the garage on his premises. I told him that Fred Weage—I asked him first if this was his place over there, and this was—I asked him if the place he came out of was his premises,

(Testimony of E. B. Sisk.)

or the place he started into, my understanding being that the place to my left—he said, "This is mine over here." I said, "What are you doing over here," pointing to the garage he came out of, and he said, "Putting some things over there." I said to him then, "Fred Weage has a search-warrant at the front of the house, and wants to see you." He said, "All right, I will go up," and he did go in that direction toward his own house, to which place the deputy marshal had driven. I learned afterward that the number of the house was 2248 West Washington Street. As he passed through his garage leaving me standing in the alley, I went in to see what these things were, I went into the garage he came out of across the alley from his premises to see what was the character of these things he said he was putting in there. I found that—

Mr. PUGH.—I object to what he found there.

The COURT.—Sustain the objection at this time.

A. I next went into the garage that he had come out of. That was the garage he said was not his, across the alley from the premises which he said were his. This was the garage in the back of a different house, across the alley, and in the rear of his house—in the rear of a house that fronted on Twenty-third Street. Mr. and Mrs. Luttner lived in that house. I saw and talked with Mrs. Luttner a couple of minutes after I went there; I don't know how many of the officers were present at that time, I could not say as to which of the officers

(Testimony of E. B. Sisk.)

were present, if any. I personally called Mrs. Luttner, knocked at her door and called her out. I asked her as to the ownership and [32] possession of these premises.

Mr. PUGH.—We object to that question, if the Court pleases.

The COURT.—Sustain the objection.

The WITNESS.—A. After I talked with Mrs. Luttner, she returned to her house. I saw her afterwards on those premises. She was there continuously, I think, until we left. She was out again during the time we were there, while we were waiting for an express truck, she came out again and came into the barn. There were several of the officers at that time in the barn or garage, and the defendant was standing outside in the alley. He saw me in the barn and made no objection to my being in the barn at that time. He made no objection to us being on his premises, told us to leave his premises. He made no objection to us being in the barn across the alley. I was in there for twenty, thirty minutes, or thirty or forty minutes. During that time the defendant was in the alley, and the door of the garage, a portion of the time sitting in the car, my car. Mrs. Luttner was out in the barn a portion of the time pointing out to us property in there that didn't belong to her. She pointed out property there that belonged to some one else other than her.

Q. State whether or not there was any permission given by Mrs. Luttner for either you or any other

(Testimony of E. B. Sisk.)

officers that were there present at that time to take any of the property out of that barn?

Mr. PUGH.—I object, if the Court pleases; it would be a matter of hearsay. And the further objection, if the Court pleases, it calls for a conclusion.

The COURT.—Denied. A. Yes, sir.

Q. What property did she give you permission to remove from the barn? [33]

Mr. PUGH.—If the Court pleases, that calls for a conclusion, and it is hearsay also.

The COURT.—He may answer.

A. She pointed out a trunk she said was not hers, and a barrel she said was not hers, and asked us to remove it from her premises, just the trunk and the barrel, and what they contained. I removed the trunk and the barrel from the premises. The defendant was standing there and watching us when I removed them from the premises. He saw me move them out. While he was there watching me I put them on a truck, and then they were brought to the Federal Building.

Thereupon, the witness E. B. Sisk was withdrawn temporarily from the stand.

Testimony of Mrs. W. H. Luttner, for the Government.

Mrs. W. H. LUTTNER was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Direct Examination.

My name is Mrs. W. H. Luttner and I reside at

(Testimony of Mrs. W. H. Luttner.)

2245 West Adams. I know the defendant Driskill and know where he lives. I live opposite the alley, opposite his house, across the alley. I rent those premises from Mr. Driskill. I rented them on about— it will be two years in June or July, I think, and have been living there all that time. I think I rented the premises from Mr. Driskill, or my husband; I don't remember. There are outbuildings on those premises; a garage. That was not there when we went there. It was constructed, I think, about six months after we had lived there; it might have been before that time. Mr. Driskill constructed the garage or building, and since it has been constructed I have had possession of part of it. I have used it as a store place for our furniture, and I kept jellies and different things out there. We do not keep any automobile out there, but in time we thought maybe we would get an automobile [34] and then use it as a garage. We have been occupying it as a store place since it has been constructed there. It is on the premises that I originally rented from Mr. Driskill. To my knowledge, during last April, Mr. Driskill had some property in there.

I remember an occasion of Mr. Sisk, and some other officers coming there. I do not remember the date when that was. I could not tell you approximately the date; I never gave it a thought. There were a number of officers with Mr. Sisk on that occasion. I do not remember any of their names; just remember Mr. Sisk. I don't think I

(Testimony of Mrs. W. H. Luttner.)

would remember the other names if they were mentioned; I know their faces. They were some of the witnesses that were sworn here to-day. Mr. Sisk asked me, and I gave him permission to take property out of that garage or from that building that day. He asked me whether I cared whether he moved that trunk that was out near the side, and I said no, I didn't care because it didn't belong to me, and I didn't know who it belonged to, and he could take it. He said he found a barrel with some bottles in it, and I said he could take that too, because it didn't belong to me. I don't know who they belonged to, nor do I know who put them in there. Mr. Driskill had said something to me about putting something in there. It was either on the same morning, or the morning before, he asked me whether he could put a trunk in the shed, and I said he could. He asked me whether I thought there was room enough, and I said yes, I thought there was. That was before the trunk was put in there that Mr. Driskill asked me if he could put a trunk in there. The trunk and the barrel and bottles were taken away that day. I don't know by whom. I saw the Lightning Delivery truck come up; I don't know who they were taken away by, but I think they were taken by the officers. I think I saw the truck come up, and I did not know they were taking them off; I never saw it go away. I went into [35] the house then, I think. I had some conversation with Mr. Driskill about that time about this trunk and barrel. He was arrested then.

(Testimony of Mrs. W. H. Luttner.)

He was arrested that day, and I think after he was released, why I went over there for some eggs, and he told me he had been arrested, and how it was and all that, and that was all there was to it. He said something to me about a trunk and barrel being taken out of the shed or building. He said that they had found some liquor in it. He said, 'Did you leave them take it out?' and I said, 'Yes.' He didn't say anything more about it then. He has not said anything to me since that time about my permitting the officers or allowing them to take the things out."

Cross-examination.

"At the time we rented the place, I knew of the arrangement. It was understood that he was to use that garage with us when he put it up. He put it up a few days later, and then he told us we could use the garage with him. He has been using a part of the garage since that time at all times for storage room, and he was in and out there every day, and every short time some of his folks were storing stuff back there, and had access to it just the same as we did. There was no particular division in the storehouse named as to which part was to be used by my family; it was just wherever there was room. Each one of us were to use it generally for anything we wanted to put in so long as it would hold it. At the time I rented the place, there was no storehouse or garage there. Since that was built, that is the only out-storehouse used at all on the premises of Mr. Driskill, that

(Testimony of Mrs. W. H. Luttner.)

is, not counting the garage in which he keeps the car. It is located directly across the alley from the end of the driveway into Mr. Driskill's premises. We used this storehouse or garage or barn all the time as a passageway through from one house to the other because we had no rear gate, except through that building. [36]

When I first saw Mr. Sisk there, there were about five officers with him. They were all back there in that alley. I don't know whether they had already been through Mr. Driskill's house or not. At that time they had Mr. Driskill in charge of two or three of the officers in their car some distance east of this entrance to this barn or garage, so that Mr. Driskill was not there at the time that this conversation was had between myself and Mr. Sisk.

Redirect Examination.

I do not know where the defendant was at the time I gave permission to the officers to take the trunk and the barrel out of the premises. At the time they took them out, I think he was out in the automobile. I happened to look over the fence, and I wanted to see where his wife was, and I think I saw him in the machine with the officers or somebody with him. The machine was about twelve feet from his shed. It was about the same distance away with reference to the shed on my premises. It was not between the two sheds; it was away from his shed, twelve feet away from his shed; it was where he had a garden, and I saw the machine standing there. Our shed is right opposite his shed, and it

(Testimony of Mrs. W. H. Luttner.)

was about the same distance from his garage on his premises across the alley from mine as it was from mine.

It was understood between my husband, Mr. Driskill and I, that he was to use that house for a storehouse. I was there a few days later when they talked about it together. That was at a time when the garage was built. I don't remember how long that was before this trunk and barrel were put in there, or the date that I gave Mr. Driskill permission that they might put them in there. That was approximately when the shed was built, about three months after we lived there, or six months, some time. We have been living there about two years; it was two years in June or July, something like a year and a half before. He had kept [37] some tables and things that he was fixing in there, and they were painting his shed, as a chicken-house. He has been using that right along always, and he has lots of things in the house that he wanted to store in the shed, and he had some tables and a few picture frames and things that he stuck under the roof. The morning that Mr. Sisk was there I did not point out things to Mr. Sisk that were not mine. I pointed out those that were mine, and they asked whether there was any more of his things there. I didn't think of those things that were in the shed that were under the roof, shovels and things. He was always in and out of there, because he hadn't finished building our place."

(Testimony of Mrs. W. H. Luttner.)

Recross-examination.

At the time that this garage was built, I and my husband had no car. Mr. Driskill has two cars. As to the location of where this car was that they had Mr. Driskill in at the time of this search of the barn there, that car was some twelve feet east of Mr. Driskill's main garage over on his side of the alley. The end of that is probably ten or twelve feet east beyond from the entrance to this part of the garage or barn. At the time I got there and those officers were there, I don't remember how many doors of the garage they had open. The trunk was in about the center of the shed. It would be possible from where Mr. Driskill was to see into the garage at that part of it, he could not have seen the trunk, because he was in the alley, in the middle. He was in the alley in that automobile. He could not possibly have seen in there from that position."

Redirect Examination.

I don't remember whether he was still there in the automobile when the trunk and barrel were taken out and placed on the truck and hauled away. The place where the automobile was, was not in plain view of the door where the trunk and barrel were taken out; it was away from the shed; it was east of the shed. [38] It was facing west. I think it was facing towards the shed; I don't remember. I don't remember whether there was any obstruction between the door and the car where the things were taken out; I don't know, that is, the car where Mr.

(Testimony of Mrs. W. H. Luttner.)

Driskill was and the door where the things were taken out. The trunk was in the shed and he was out of the shed in the machine. I don't know whether the trunk and barrel could have been seen from the machine where Mr. Driskill was sitting when they were taken out of the shed and placed on the truck. I suppose it was in plain view; I don't know. I know where the machine was standing and I know where the door was they were taking the things out of. I think, but I don't know, whether a person sitting in that machine could see that door and these things taken out through the door."

Recross-examination.

That was not Mr. Driskill's car that he was in. It was an officer's car. I think there were two or three officers sitting in there with him in the car; there were some men in there. I was nervous and didn't pay much attention to it. I saw Mr. Sisk when he first came up there. There were a number of other officers with him at the time when he first came. I don't know whether Mr. Driskill was there at that time. They were talking and walking back and forth, and I didn't pay much attention to them. I don't remember seeing Mr. Driskill around there when they took the trunk away, I don't know whether they had already gone with Mr. Driskill, I think he was in the automobile. I don't know whether he had gone yet or not."

Thereupon the witness was excused.

Testimony of E. B. Sisk, for the Government. (Recalled).

E. B. SISK was recalled, and having been theretofore sworn, testified further as follows:

Direct Examination (Continued).

On the occasion of my being at the garage or barn or shed [39] upon the Luttner premises that I have just testified to a few moments ago, I took a trunk out of the shed.

Mr. PUGH.—Now, I object, if the Court pleases, the evidence already showing that this was upon the premises occupied by the defendant, and we object to any showing of anything seen or taken out or anything done there, until it is shown it was done in a proper legal way.

The COURT.—He may state what he took out, not the contents.

The WITNESS.—I took out one trunk and one barrel.

Mr. LANGSTON.—Q. And what was in the trunk, and what was in the barrel, if you know?

Mr. PUGH.—Object, if the Court pleases.

The COURT.—Was there anything in the trunk and barrel?

Mr. LANGSTON.—Q. What was in the barrel and what was in the trunk?

Mr. PUGH.—We object upon the same grounds, if the Court pleases.

The COURT.—Is there any other testimony at present upon this phase of the matter?

(Testimony of W. H. Luttner.)

Mr. PUGH.—There is if the state has closed.

Mr. LANGSTON.—I think not on behalf of the Government, your Honor.

The COURT.—Do you want to present your testimony, now?

Mr. PUGH.—We are ready.

Thereupon the witness was excused temporarily.

Testimony of W. H. Luttner, for the Defendant.

W. H. LUTTNER was called as a witness by the defendant, and having been first duly sworn, testified as follows:

Direct Examination.

"My name is W. H. Luttner. I live at 2245 West Adams. I rent the house there where I am living from D. B. Driskill. I rented it about June the first, 1920. I have been living there [40] during the time since that. At the time I rented the premises there was not any garage or shed in the back part of that lot adjoining the regular garage or hen-house of Mr. Driskill. I pay Mr. Driskill thirty-five dollars rent. About sixty or seventy days after the making of the lease the garage was erected. At the time I leased the place there was no contract at that time that I was to have a garage or a shed erected upon there for me. The possession of that shed, barn or garage, erected there, since the time it was put up and especially along about March and April of 1921, has been a sort of joint possession. I had some excess stuff around my house; didn't know where to put it, and

(Testimony of W. H. Luttner.)

had it covered up temporarily in the yard and afterwards Mr. Driskill agreed to build a permanent shed there of some kind and let me use a part of it. That is, he made me a proposition that he was to use part, and I was to use part. Since that time, and especially along during March and April of 1921, Mr. Driskill has used it for the storage of tools and furniture, and odd pieces of furniture and boxes and so forth. Mr. Driskill has had access to it at all times. It sets right on the alley; it backs right against his premises. It is used customarily also as a passageway between the two places. The possession and use of that is common between my family and the family of Mr. Driskill.

Cross-examination.

At present I am engaged in maintenance work at the High School. I do maintenance work, motors, taking care of the motors and repairing, and keeping the place in order. I am a mechanic, I had this garage so built there by arrangement between myself and Driskill, that I had some excess stuff around there and had no place to put it. It was built there for storage room; I had no automobile. I desired to put in whatever I had, anything that I had to store. Can't say exactly, but I believe I am right in saying that Mr. Driskill put some in there immediately after [41] it was built. The first thing I believed he stored in there was some feed boxes, if I remember right, chicken feed. That was a day or so, two or three days, maybe, after it was built. He put tools in there, probably, I

(Testimony of W. H. Luttner.)

didn't pay much attention as to what he put in there; it was none of my business. He would not tell me from time to time what he was going to put in there or make any suggestion. There were no locks kept on the doors. We might close them, not lock them. He used the building as a passage-way from my premises out into the alley through the doors.

Redirect Examination.

He was using his garage as a sort of a breeding-house, I might say, or for chickens in general, and he used this as a place where he kept the feed for them. They came in there quite often in getting feed for and in feeding the chickens, just across the alley.

Recross-examination.

Other people stored furniture and things in there too, one other person, John Houston. He has no permanent residence that I know of; he is moving around the country. He has several trunks in there, and a table and a barrel or two, and some paper boxes, by my permission. He said he would pay me rent, one dollar a month for storage, if I would take care of the stuff for him. I don't remember exactly how long I did take care of the stuff for him, some time since last spring, and it is still there.

Redirect Examination.

Prior to making the arrangement with Mr. Houston, I don't recall having talked to Mr. Driskill about it."

Thereupon the witness was excused.

Testimony of D. B. Driskill, in His Own Behalf.

D. B. DRISKILL was called as a witness in his own behalf, and being first duly sworn, testified as follows: [42]

Direct Examination.

My name is D. B. Driskill. I am the defendant in this case.

Mr. PUGH.—I take it it will be understood by counsel that in putting the defendant upon the stand before the state closes is on the particular issue now before the Court.

The COURT.—Proceed.

A. I live at 2248 West Washington Street. I am not sure whether my premises extend back north from the street on which my house faces a hundred and fifty or a hundred and sixty-five feet. They run north and south. The place I live in is a brick cottage. I have two chicken-houses, one garage, and on the property right behind, right across the alley, I have a dwelling-house and a garage and a storehouse. The property, the house back on the other street, on the other property has been rented by me to Mr. W. H. Luttner. There was no storehouse or garage on that at the time it was rented. I built the present barn and storehouse or garage with my own labor for a storeroom for myself and tenant. From the time I built it, we have got a little furniture out there to our place; in fact, we have enough furniture for two people, and I have been raising chickens, had four or five hundred

(Testimony of D. B. Driskill.)

chickens out there, and the big garage I wasn't using for a garage I used for incubating, for an incubating place, and hatching, and raising little baby chickens. At the time I put this house in the rear up, and I didn't have enough room in there to keep my other things and feed, and everything, and so I built this; Luttner had some furniture and he had moved in here from St. Louis, and he had been living in a larger house, and this house he lives in now is simply a three-room house, and he had some of his furniture out in the corner of the yard under a canvas, and I thought that it would be a good thing for him and for me both if I would build this garage. He didn't have a car at that time, and I said, "Well, I will put up this garage and we will both use it, and some time [43] I may have in the future, if I don't need it, why it will be—" I had the distinct understanding with Mr. Luttner that I would put this garage up and we would both use it. I built them a little shed on the west side to use as a washroom, to wash their clothes, and keep their washing-machine in, and so forth, and they did most of their work out there, so that the agreement was that we were both to use this shed without any specific corners, or there wasn't no specific arrangements as to what we would put in there, or put anything in there that didn't interfere with the other fellow, so we had some tables, I had two or three; we had one table, had a trunk of clothes in there, and I kept mine, some of our winter clothes in there in the summer-time, and in the

(Testimony of D. B. Driskill.)

summer-time we put our clothes that we wasn't using in there, and just soon after it was built, at that time, why we had these chickens, and I had to put all of my chicken feed over there, or leave it out and let it rain on it, so I used it mostly at that time for chicken feed, and other times along whatever we didn't have any place to store, why we took it over there and put it there. So, not so long ago he came to me and said he had a friend by the name of John Houston that wanted to store something in there. John was going to Los Angeles, and that they was figuring on coming back here, and wanted to know if he could take care of this stuff temporarily, and he had some wireless proposition that he didn't want to trust down here in the public warehouse, and Mr. Luttner had been helping John put up this aerial out there at my father-in-law's place, and so he brought this stuff over, and I said, "Yes, that is all right with me"; I said, "I don't suppose it will make any difference," and he piled it up there in the corner of the garage, and it is up there now.

I had access to the place, and Mr. Luttner had access, and most anybody else could get in there at any time; there wasn't any lock on the door. There was no lock on the door between [44] that and the alley. I think Mr. Luttner has a little lock on the front door up towards the house that he lives in, that he used to keep the kids from coming in there, to keep them from bothering his tools, and has three or four children there.

(Testimony of D. B. Driskill.)

That building is within fifteen feet of the garage across the alley next to my house that I was using for incubator purposes. The corner of that building is practically the corner of that is right opposite the corner of my garage; it is sixteen feet further west than my other place. The means of access from the premises on which my house or residence is located and over to Mr. Luttner's place is through my back garage. There is no other means of going through without you go around, come around the alley and climb over the fence. I recollect the time of Mr. Sisk and those other gentlemen coming there. That morning I was over at Mrs. Luttner's fixing or about to fix some lattice work on top of the grapevine proposition, or sort of a pergola, we call it, and as I was getting back, as I was coming back to get a hammer and some tools, I had been over there measuring how much lumber I needed for this particular purpose, and as I was coming back, why my wife was calling me, and I walked out through this garage, and as I came out of the door, Mr. Sisk and those officers that he stated had stopped in a Ford car, fifteen to twenty feet east of the east entrance of my garage, which would mean a distance of thirty-five feet, well, from thirty to forty feet, to be exact, from the end of their car, the front of their Ford car, it was a Ford, I think it was, to the garage entrance. Both doors of the garage were open; it is a double door garage, and the door that swung back to the east obstructed Mr. Sisk's or my view, or anybody else's view from seeing in

(Testimony of D. B. Driskill.)

that garage from where that car was sitting. I would be glad to take anybody out there and show them, and it would be utterly, physically impossible for Mr. Sisk to see me or anyone else to handle, take or carry away, or move, anything in [45] that garage from the place that he claimed that he saw me take hold of a trunk and move it around. After they stopped Mr. Sisk says, "What are you doing over—" No, he says, "Where is Driskill?" —they didn't seem to know me—and I said, "I am Driskill," and he said, "Where does Driskill live?" and I says, "Right over here," pointing to my brick house. My wife was calling me at the time and I went over there. And he says, "Fred Weage has a search-warrant for you," and I says, "All right." I went over to Fred Weage, and I am not sure whether Mr. Sisk went with me at that time. I went to the front of my place, went in my house, went to the front door, opened the front door, and Mr. Fred Weage and some other men, I forget who it was, maybe, I think it was Sisk, had come around at that time, and said, "We have a search-warrant for you and we are going to search you," and I said "All right, let's see you read it." Mr. Weage said, "I don't have to read it." "Well," I said, "Let me see," I says, "If you have a search-warrant, come on in." They read the search-warrant, supposed to be a search-warrant, calling for a certain number at 2216 West Washington. I told him that this was not the place, that there was nothing there, and for them to get off. They said, "We

(Testimony of D. B. Driskill.)
are going to search; it is for this place," and they went to work. Mr. Weage read the search-warrant to me there standing in my door, and the other officers coming up from the rear, and the yard was full of them, too, so I stood there, and when he read this 2216, I am not sure about the number, I have it copied there, I said, "The number you are looking for is up further on the street about the third or fourth house from here." "No, this is the place; you ain't got no numbers on this house." I said, "It don't make any difference; your search-warrant calls for that number; go search it." So he said, "You can't refuse to let me search it because your haven't got any number on the house." I had been painting the front of the house at that time, [46] and where we usually keep the numbers on the place, I had taken them off to paint under them; they wasn't out in plain view, but they was laying there. Of course, I did not know whether that was necessary or not, so I said, "Get out of my place." I was very nervous, very excited. I told them to get out of my place, and out of my property, and *and* to get clear off and stay off, and Fred Weage says, "Oh, all right; I didn't make this mistake," and Mr. Sisk was looking in reference to the number on the search-warrant, and Mr. Weage, I am not sure whether he said, "Oh, all right," or not, but something similar to it. He said "Our office didn't make this mistake." I said, "It is none of my business; get off my property," and it seemed to make Mr. Sisk very

(Testimony of D. B. Driskill.)

mad, and Fred says, "Yes, we are wrong." And one of them gave instructions for the other fellow to beat across around. I think he says, "You go out to the front and watch the front," and for somebody to come by the rear and watch the rear, kind of gave instructions that intimated that they was going back to get another search-warrant, so I says, "Get out of my place, get off my ground, get clear off the territory," and I went around at that time to the back, and there was a bunch in the back, and I went around there, and asked them to get off my territory, and while I was there going down my pathway to the garage to notify those other fellows to get off my territory, Mr. Sisk came up to me, caught me by the arm, and he says, "You bootlegging son-of-a-bitch, I will knock you in the head with this gun." My brother-in-law was present when he said that; his name is Charles L. Volt. And we were walking; I was fixing to go back to the garage; I was going back towards the garage to the entrance of this particular garage right straight back, and that is the time he caught me by the arm, and he said, he says, "You bootlegging son-of-a-bitch, I will knock you in the head with this gun." I said, "If you do in this instance, you will not knock anybody else in the head." [47]

Then he called an officer and he took and put me, I said, "Have you got a warrant for me?" He said, "No," I said, "Have you seen me do anything?" He said, "No." And about that time you (referring to Mr. Pugh) and someone else came up.

(Testimony of D. B. Driskill.)

At the time they said they had the search-warrant for me, I had stepped to the telephone for you, and I called for my brother-in-law. So when you (Mr. Pugh) came up, then Sisk had me arrested, said he didn't need no warrant, and showed me his authority here (indicating), kind of looked like a gold shield he had. I said, "Have you got a warrant?" He said, "No, I don't need no warrant; here is my authority." Then he said, he designated another officer, McGrath, and I am not sure about the other one, to take me back and put me in the car so that I could not raise any hell, and then in their presence I asked them again about the warrant, if it was possible they could come to people's homes and take people away from their homes without a warrant, or without a search-warrant, or without seeing them violate any law, and he says, "Take him and keep him in that car; put him in the Ford car." Mr. McGrath was present at the last conversation; I went in the car and sat with Mr. McGrath. They pushed me in the car, practically. I had sense enough not to resist them, because I was afraid they would knock me in the head with a gun, and I made them forcibly push me in, and not going willingly to be arrested, being on my property, and Mr. McGrath—understand, Mr. Sisk was the one, the only gentleman in the bunch that had used any rough language, or acted in a threatening manner, or anything like that. The other officers were very nice.

While I was under arrest in this car, and could not get out of the car I could not see what was going on,

(Testimony of D. B. Driskill.)

of course, and it would be hearsay except after I was sitting there possibly ten minutes, Mr. Sisk came back and said to me, "I don't see why you want to object to anybody searching your place; there is nothing [48] in there." I said, "Well, maybe I was afraid you would steal something—the silverware"; I am not sure whether they got any right there or not, and then he says, "You (Mr. Pugh) asked them at that time in my presence if they was going to arrest me," and he said, "I think so," and you asked them about a warrant and they didn't have much to say to you and my brother-in-law was there, so I had on my overalls, I was working in the backyard, and I said "Boys, let's go in and get some clothes." Mr. Wilkey went in with me and I changed my clothes, put on my clothes, and came uptown. They had me there in that car and I could not see anything at all as to what else was done with regard to the search of the garage and other outbuildings, or searching the house, or anything else. With regard to this garage, or storehouse, they never asked me could they search it, never asked me anything about it at all, and I didn't see them take anything out of there. At the time I was sitting in this car there was several officers, I think, went in the doorway of this garage, and of course the car being where it was, I could not see what they were doing in there, and I could not get out of the car to go over there. I know they did go in there. I did not tell Mr. Sisk that wasn't my place. I did not tell any of the officers that.

(Testimony of D. B. Driskill.)

Cross-examination.

The car that I was sitting in belonged to the officers; I think Mr. Sisk. I don't know who it belonged to; I think Mr. Sisk was the gentleman that drove it up. The car was facing west, and the door where these things were taken out of the garage faces south. This car was thirty to thirty-five feet; I would not say thirty to thirty-five or forty exactly, for I have never measured it; it was between thirty and forty feet east of the entrance of the door. There was an obstruction between the car and the open door. There was a double door swings out, and I could see [49] the door, the door opens out, opens east, and there would be four or five feet wide, but it didn't go clear back, just about two-thirds of the way back, and that would obstruct the view so it would be physically impossible for anyone to see into the garage two feet back. If the door was swung back two-thirds of the way then there would be only a space of a foot or two *out* outside from the building to the edge of the door, from the outer edge to the door, to the back of the building, would only be a foot. I could not see anything removed out of there, because there was nothing removed out while they had me in the car. I saw no truck come up; there was nothing taken away from there while I was in this car under the detention of Officer McGrath, and it was, I understand, of course, I can only talk by hearsay, I understand it was later. There was nothing taken out of there in my presence, and no truck came

(Testimony of D. B. Driskill.)

there. I do not know when it was taken out; I never saw it taken out. I did say the officers were in my house, Mr. Weage and Mr. Sisk. I can't say that Mr. Sisk was there; I said I thought it was Mr. Sisk at the barn door. That is not where he used this rough language toward me. Mr. Sisk was not in the house at the time he called me a "son-of-a-bitch." At the time I mentioned Fred Weage being in there with the search-warrant, I am not sure whether, as I said a while ago, whether it was Mr. Sisk, but I am sure about Fred Weage started to read me the search-warrant. I was very much excited. I did not use rough language towards Mr. Weage and curse him and swear. I told him to get out of it; I never used an oath on the boys. I did not tell them to come ahead or go ahead and make a search if they wanted to. I am positive of that. It may be possible Mr. Wilkey was in there with Mr. Weage when he had the search-warrant in my house, some officer was there; I would not say for sure. I was not out in the alley on the occasion Mr. Sisk used this rough language at me; it was going down my driveway towards my [50] garage. That was before I was put in the car; I was directly on the way to the car. After I was put in the car, I don't know whether I pushed Mr. Sisk aside and climbed out of the car forcibly or not; I don't remember whether I did or not. It was not then that Mr. Sisk told me to get back in there. It was one of the other officers. Mr. McGrath says, "Get back in," says, "Come on back in

(Testimony of D. B. Driskill.)

here, Driskill." Of course, naturally, I was trying to get out of there so I could see what was going on, and for that reason only I wanted to get out of the car to go and see them, and McGrath says, "Come get back in here." I don't know when anything was taken out; I didn't see anything taken out.

I did not say this man Houston came to see me. He did not speak to me about it; didn't say a word to me. I had no arrangement with Houston about using that, and I knew nothing about Houston using it until Luttner told me. I think that was before the things were put in there, I won't be sure about it. I did not know Luttner was charging for it; it would have been all right with me if he had. I don't think Luttner told me he was charging for it. I think Luttner kept a small lock on the door of the building opening into his yard towards his house. Sometimes that would be locked, and sometimes it would not. Most of the time it was not locked. When it was locked, I could go through; he generally kept the key out of reach of the kids. I knew where that key was when it wasn't locked and had access to it. That was on the side of the building on the inside of the yard. Coming from across the alley where I lived, I would not have access to the key without climbing over the fence. If the door was locked I could not get through it, but it wasn't locked, the back entrance to my garage.

I think Mr. Weage said he did not have to read the search-warrant. He read the search-

(Testimony of D. B. Driskill.)

warrant after I told him he would [51] have to read it. He read it to me. Then I discovered that they had no search-warrant for my place, no search-warrant for my place. That search-warrant was for stolen property. It described the property. I forget what it said; I could not remember it.

Thereupon the witness was excused.

The COURT.—Proceed; anything further?

Mr. PUGH.—That is all.

Testimony of Fred A. Weage, for the Government.

FRED A. WEAGE was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination.

I am a deputy United States marshal. I remember the occasion last April when I had a search-warrant for the premises of Mr. Driskill. I did not serve that warrant nor attempt to. I went to Mr. Driskill's house, and his wife came to the door, and I told her I had a search-warrant for the house. Mr. Driskill came through the house at the time in company with Mr. Lucey. I gave a copy of the search-warrant to Mr. Driskill, the defendant here, and started to read the search-warrant to him. I read the search-warrant, and he informed me that that was not the number of this house, and that I could not search the house on that warrant, and he became very abusive, and said, "God damn you; get out of my house, all of you," and I walked with

(Testimony of Fred A. Weage.)

him out in front of the house, and he told me the numbers of the house had been taken off; it was not the number called for in the search-warrant. I told him very well, no need for him to get excited, and I would not serve the warrant at that time. Jack McGrath, a city police officer, and myself and Mr. Lucey were present at that time. No one else was exactly present, although another police officer was in the front yard in front of the house. So I called my assistants off, told them I could not serve that warrant, as a mistake had [52] been made in the warrant, and he says, "Well, go ahead and search, then; search everything." I says, "All right," and I asked Mrs. Driskill if she had any objection to a search being made, and she said, "No, none whatever." I then looked through the house, and Mr. Wilkey, Mr. McGrath and myself. After I looked through the house, I did not make any other search or take any property, didn't find anything called for in the search-warrant in the house. And I went out through the back. When I got into the back I was called across the alley by Mr. Sisk, a Department of Justice man, who had there a trunk containing—

Mr. PUGH.—I object, if the Court pleases, to any further statement about what he found there and what it contained.

The COURT.—He wasn't stating what it contained, just what he found.

The WITNESS.—Q. The trunk was in a small barn or garage across the alley opposite of Mr.

(Testimony of Fred A. Weage.)

Driskill's place, directly on the alley of Mr. Driskill's place, Mr. Sisk was there. I saw the trunk. The trunk was in this small barn or garage, also a barrel of empty pints, empty pint bottles. Mr. Sisk went out as an assistant to me on this search-warrant, all of the other officers also. Mr. Sisk and Mr. Lucey and Mr. Wilkey were in one automobile. They went through the alley; they were to go at the rear of the house. They took possession of the trunk and barrel. I took possession of the trunk and barrel after Mr. Sisk had handed it over to me. I saw where he got the trunk and barrel. He got it in this garage or barn opposite Driskill's place across the alleyway, directly in the rear, the place that belonged to Mrs. Luttner. That was after the conversation I have told about between Driskill and his wife in their house with reference to the service of a warrant or making a search. The truck was ordered and I accompanied the truck driver with the barrel and the trunk and contents, and brought it to our office up here. At the [53] time the barrel was taken out of the garage, the barrel and trunk, Mr. Driskill was sitting there in the car that Mr. Sisk had. The car was about one hundred feet up the alleyway from the garage. The trunk and barrel were loaded on the truck right in back of the garage as near the door as it was possible to get it. That was in plain view of the car where Mr. Driskill sat. I heard considerable conversation and had some with Mr. Driskill while he was in the car, and

(Testimony of Fred A. Weage.)

while the things were being taken out of the garage and loaded on to the truck. Nothing in reference to the taking out of the trunk and barrel. He made no objection in my hearing to taking the trunk and barrel out of that barn. He made no statement to me as to whose barn that was, nor in my hearing. I did not tell Mr. Driskill in his house that I did not have to read the search-warrant to him. I did not use any rough or bad language toward him at that time.

Cross-examination.

After my attention was called, that it had a mistake in the search-warrant, Mr. Driskill ordered us off the premises. I believe his wife was present at the time. That was in the vestibule of his house, inside the door. I had walked in there with the consent of his wife. His wife came to the door before he did. She told me to come in. I told her what I wanted when she told me to come in. She told me to come right in. Then after Mr. Driskill used this rough language at me and told me to get away, he told me I might come on through. He said, "Go ahead, you can search everything." He just said, "Go on." I don't think anybody arrested him. I think Mr. Sisk detained him. I don't know as I would say "Took him." He detained him. He did not detain him by one arm that I saw. Mr. Sisk did not go through the house with me after this invited search. He did not go around with Driskill, around the house on the east side that I saw. After I [54] had completed my in-

(Testimony of Fred A. Weage.)

vitation on these premises, and got out of the back door, I found Mr. Sisk back on the side of the barn, back behind. He did not have a search-warrant back there. He was working under me. I told him to go over the rear of the premises. That is what I call the rear of the premises. I did not tell him to enter any buildings and search in the rear of the premises. He did not have any authority from me, as holder of the search-warrant, to go into that shed or barn across the alley on the adjoining property. I don't know that he first put Mr. Driskill in the car before he went into the storeroom, I don't see how he came, because Mr. Driskill came through the house, and I read the search-warrant. After I went through the house, and after Mr. Sisk came around the back way, and I went out and saw Mr. Sisk again, Mr. Sisk was in the barn when I first saw him, and Mr. Driskill was in the car. He was being detained by Mr. Sisk. Mr. Sisk was in the garage. I mean to say that Mr. Sisk was in this barn or garage, but he was detaining Mr. Driskill in the car one hundred feet east. He was doing this detaining through the instrumentality of Mr. Lucey, I think. I don't think anybody else at the time. I did not notice whether there was any force used in this detention at that time. I did see Mr. Driskill try to get away a couple of times after he was in the car, I think he made one attempt, pretty near got out of the car, and he was held back by the officers, by the police officers. The car was standing still at that

(Testimony of Fred A. Weage.)

time. He wasn't under arrest there by me. He was not under arrest by anybody that I know of. I think he was detained by Mr. Sisk. I detained him on down town following that for some time.

Thereupon, a recess was taken until nine-thirty o'clock A. M., October 29, 1921. [55]

9:30 o'clock A. M., October 29, 1921.

Testimony of Daniel J. Lucey, for the Government.

DANIEL J. LUCEY was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination.

My name is Daniel J. Lucey. My official position during last year was inspector, City Police Department. I have been such about a year. I was so engaged during April of this year. I was present at the time when the search of the premises were made out near Mr. Driskill's house, at the time he was arrested or taken into custody. I was in the house at the time Mr. Fred Weage, deputy United States marshal, was there for the purpose of serving a search-warrant. There were in the house, Mr. McGrath and a Deputy United States Marshal Weage. I also think that Officer Balz was there, but I am not sure, and Mrs. Driskill, I believe, was there, and also the defendant. No one else was there that I can recall. Mr. Sisk wasn't in there at the time. Mr. Wilkey was not there at the time. The deputy United States marshal began to read the warrant,

(Testimony of Daniel J. Lucey.)

the search-warrant, and I believe until he got to the address of the house, I believe it called for the wrong address, 2218, I believe, the search-warrant called for, and at that moment the defendant Driskill turned around and he says to all of us, "Get out of this house, and be damn quick about it; get out, all of you," so we got out. He said, "This warrant does not call for my house." We got out. I was afterwards in the house. The second time I went in the house, Mr. Sisk, Mrs. Driskill, Weage, McGrath and myself were there. While I was standing there, and the defendant Driskill turned around to all of us, and he said, "Search the house, search it, search everywhere, search it any place, search it anyhow," and we started to searching. I searched most of the rooms in the house, inside the house. I did not search anywhere else while inside the house. Outside of the house, we went into [56] a place across the alley and found a trunk. At that time I believe Mr. Driskill was in the house, I believe Officer Balz was with him at the time. I know he was in the house getting dressed and putting other clothes on. Mr. Sisk and Mr. Wilkey went into the building across the alley and made the search first, then later on I went in. That is all, the three of us. While waiting for Mr. Driskill to get dressed, I believe the trunk and booze was taken out of there.

Mr. PUGH.—Now, I move to strike that out, if the Court pleases.

The COURT.—It may be stricken, and the jury

(Testimony of Daniel J. Lucey.)

will disregard the statement the trunk and booze was taken out of there.

"A trunk and barrel; the contents of the trunk was, I believe, seven pints."

Mr. PUGH.—I move to strike out that answer.

The COURT.—It may be stricken.

"That was all that was taken out, the barrel and trunk. Mr. Driskill was in the house, I should judge, about half an hour. When he came out of the house I was in the alley across the way, north of Mr. Driskill's house in the garage, and the box and trunk, when he came out of his house, were still in the garage. When Mr. Driskill came out, I was placed in charge of him by Mr. Sisk. Mr. Sisk told me in Mr. Driskill's presence, to watch Mr. Driskill, and he also told Mr. Driskill beforehand that he was under arrest, that he was a Government man and he showed him his badge and told him he was under arrest. He told me to stay with him in the machine, which I did, and Mr. Driskill then got out of the machine and went to talk to Mr. Sisk, and told Mr. Sisk that nobody could arrest him, so Mr. Sisk got hold of him by the arm, gently by the arm, and says, 'The next time you get out of the machine I will have to put the cuffs on you.' He did not say at that time within my hearing to Mr. Driskill, 'You bootlegging [57] son-of-a-bitch, I will knock you in the head with a six shooter or gun,' or words to that effect. I was there; I didn't hear it. I was there at the time he was put in the car and when he got out of

(Testimony of Daniel J. Lucey.)

the car, and when he was put back in the car. At that time, as soon as Mr. Driskill got out of the car, I followed him to Mr. Sisk, about four or five feet. After Mr. Sisk put Mr. Driskill back in the car, I stayed with Mr. Driskill. Mr. Sisk, I believe, went about, up into the garage, I believe, across the way. Then I believe that Mr. Driskill asked to go in the house, and I accompanied him in the house until he got things straightened out, that is, his clothes, and such as that. I was in the house during that time, while Mr. Driskill was in the house. I came out with Mr. Driskill. When he came out he got in the city machine, I believe, and we took him to the station. When the trunk and barrel were taken out of the shed, I believe, Mr. Driskill was in his house. When the trunk and barrel were loaded into the truck, he was in the house. He was in the house when the trunk was taken away from there.

Cross-examination.

I went to the Driskill house with Mr. Sisk and Mr. Wilkey and Deputy United States Marshal Weage. They had not deputized me. My authority was that of a city police officer. I was acting on my responsibility as a city police officer when I did what I did there. When I arrested Mr. Driskill or held him I was acting then as a police officer. I did that at the direction of Mr. Sisk. He is a United States Government officer. I was acting as assistant to him as an officer of the Government, of the United States Government, helping him out

(Testimony of Daniel J. Lucey.)

in this arrest. When Mr. Driskill found out that the warrant was for the wrong place, that the number was wrong on the house, he told us all to get out of there. We got out. He followed us out. He wasn't in a very good humor then. He used some rather strong language. I should judge [58] it was about a half an hour after that that he was taken in charge by Mr. Sisk. I was there that long. I mean to say that after he had ordered us out and before Mr. Sisk took him in charge, he got in a good humor and invited us in. Immediately after he invited us in, I did not put him under arrest. After he came out, after he told us to search anywheres, or any place at all, he came out towards the alley, this defendant Driskill came out in the alley, and then he told, that is the time he jumped out of the machine, he said nobody could arrest him on account of the warrant, he said nobody could search his house. He told us to go ahead and search. I did not hold him in the car after he told us to go ahead and search. I had charge of him. He did get out. I told him to stay in. While I was searching the house, Mr. Driskill was in there dressing. He seemed to be in a good humor. When I first went in there he had working clothes on. I dont' know whether he was getting ready to go somewhere when he went in there to dress. Nothing said about going to take a little trip at that time that I heard. I did not find out why he was taking off his paint clothes and putting on his go-to-meeting clothes at that time. Nothing said about going to the city jail that I know of. I

(Testimony of Daniel J. Lucey.)

don't know of any trip he contemplated at that time. As soon as he refused to let us go in the house, and used this language, I did not immediately put him under arrest and tell him to dress, and as soon as he was dressed, took him out to the car and kept him there. I know he was dressing. I did not hear Mr. Sisk call him a bootlegging son-of-a-bitch and threaten to hit him with a gun. I saw you (Mr. Pugh) there. After you came I did not hear Mr. Driskill in the presence of Mr. Sisk repeat those same words, and I did not hear Mr. Sisk say at that time, 'Well, which one do you deny, the bootlegging, or the son-of-a-bitch?' I did not hear Mr. Driskill repeat that to you and tell you he had called him that and threatened [59] to hit him with a gun. I was there. I didn't hear a statement to that effect; all I heard was Mr. Sisk said, 'If you don't stay in the machine I will have to put the cuffs on you.' To the best of my knowledge, I believe that the truck left the premises first. Now, that I could not say because we were in the house at the time, and the machine was waiting out in front, the city machine. I did not see the truck leave there with this barrel. I was in Mr. Driskill's presence all during this period that the truck was there and I didn't see it. I could not see it from the house."

Thereupon the witness was excused.

Testimony of J. J. McGrath, for the Government.

J. J. McGRATH was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Direct Examination.

My name is J. J. McGrath. I held the official position of police inspector, City of Phoenix, during last April. I made a trip out to the premises of Mr. Driskill during April, along about the 21st or the 23d of April. I went out there with Officers Lucey, Balz, and myself, of the police department, and Mr. Sisk, Wilkey, and Fred Weage, of the Government. I went there at the *rest* of Mr. Sisk and Mr. Wilkey and Mr. Weage. After arriving there I was in Mr. Driskill's house when Mr. Weage went in there to serve the search-warrant. I heard a conversation between Mr. Driskill and Mr. Weage. I was not present at any time when Mrs. Driskill was there. I did not hear Mr. Weage say to Mr. Driskill that he did not have to read the search-warrant. Officer Lucey and myself and Mr. Weage, not Lucey,—I will change that to Officer Balz,—I said Officer Lucey, went to the front door. Mr. Weage knocked on the door, if I remember right; Officer Lucey brought Mr. Driskill into the house, to the front of the house and said Fred Weage had the warrant, he wanted to [60] serve on him, and Mr. Weage started to serve the search-warrant, and if I remember right he read it on through, and when he got through reading

(Testimony of J. J. McGrath.)

the warrant, Mr. Driskill told him, he said, "My number is not 2216 West Washington; it is 2248; get out of my house, all of youse." We stepped out of the house. I never did afterwards go back into the house. I was in the front end of the house most of the time. I remained there. After that, later on, quite a bit later on, why Mr. Driskill gave them permission to search the house, told them to go ahead. He said, "Go ahead and search everything," he said, "If you want to." The house was searched. The garage just north across the alley from Mr. Driskill's house was searched. I was not in the garage when it was searched. We were still in the front end of the house,—I was still in the front end of the house. I remained there all of the time watching the prisoner. I don't know what took place out at the garage then. I was not there when Mr. Driskill was put in the car nor when he got out of the car.

Cross-examination.

Mr. Driskill later gave permission to search the house. If I remember right, there was present Officer Lucey, Fred Weage and myself, and Joe Balz. Mr. Driskill was present. That took place just about halfway I think, from between the house, say from the front end of the house to the rear; it was about half way. It was not in the house, it was on the outside of the house. On the east side. We were all present out there. I don't believe Mr. Driskill had been arrested yet. He had not changed clothes for any trip yet. I did not see Mrs. Dris-

(Testimony of J. J. McGrath.)

kill at that time. After he said search there, I just stayed there on the car out in front. Officer Lucey was the one who went to search and I would not say the other because I don't remember. They must have kept Driskill out in the back, in the alley, when they did this searching. I guess they took him out to the car. [61] While he was inviting them to search, I guess they put him under arrest, and put him in the car right there in the back alley. After this, later, I did have custody of Driskill out there in the car in the back alley. Officer Lucey was with me there at first. I did not hear any conversation there after I came out between Driskill and Sisk. I recall that about this time after I was back in the alley there, that you (Mr. Pugh) came there to the car, and also Mr. Bolin, another man came there. I do not remember Mr. Sisk coming there at the time and you asking him whether or not Driskill was under arrest. I do not remember Mr. Sisk calling Mr. Driskill any names there on the car. I do recollect that in your (Mr. Pugh's) presence and in my presence Mr. Driskill told me and you together that Sisk had called him a bootlegging son-of-a-bitch. I do not recollect that Mr. Sisk answered back, "Which one do you deny, the son-of-a-bitch or bootlegging?" I did not hear that. I don't remember anything Mr. Sisk said back at all, but I do remember Mr. Driskill accusing him of having that done. I could not refresh my recollection and memory as to what Sisk said. I could not recollect just what was said.

(Testimony of E. B. Sisk.)

I do not know whether he admitted it or not, I didn't hear him. I didn't hear him admit it, and didn't hear him deny it that I remember of.

Thereupon the witness was excused.

Testimony of E. B. Sisk, for the Government (Recalled).

E. B. SISK was recalled and having been theretofore duly sworn, testified further as follows:

Direct Examination.

I remember the time of the taking into custody of Mr. Driskill. I do not remember using this language, or anything like it: "You bootlegging son-of-a-bitch, I will knock you in the head with a six-shooter." Mr. Pugh was there; he came there while we were there. I would not be able to say definitely how [62] long before I left that he came there; he was telephoned in town after we got there, and I judge he was there some minutes, probably ten or fifteen minutes before we left.

Cross-examination.

Mr. Driskill did accuse me there in the alley of having called him names. I said at the time that you (Mr. Pugh) came there, and I recollect definitely him saying that I had called him some name and applied some epithet to him, the exact words I don't remember that he used, and my reply was that whatever I had said to him had been done to subdue his resistance to arrest, and that any forcible language I had used to him was to prevent injuring physically, and I said, "That is better in my opinion," "Whatever I did say to you was better than

(Testimony of E. B. Sisk.)

using force on you, wasn't it?" and he said, "Yes." I recollect giving him that little lecture at that time. I gave him another one before that time, gave another lecture, told him in my opinion I was not only authorized but directed by the prohibition law to place him under arrest when he was found transporting liquor, without a warrant, he maintaining we didn't have a warrant, and defying us to arrest, and it was necessary for me to forcibly arrest him. He dared us to lay hands on him. When Mr. Driskill accused me of using those words, I do not remember of having answered in substance like this: "Which one do you deny, the bootlegging or the son-of-a-bitch?"

I went there in my car. I stopped that car out there around in the alley in the rear of Mr. Driskill's premises, I should say twenty-five feet. I left the car in the rear of Mr. Driskill's premises, about twenty-five to thirty-five feet, I should say, east of his garage, and on the same side of the alley as his garage. I saw from the place where I was in the car, saw him in that building from there fooling with a trunk. Both doors of that garage that he was in, the garage was across the alley [63] from me, I was sitting this way from it (indicating), across the alley, and both doors were wide open, and he was directly in the corner, he was not over a foot from the alley line where we found the trunk and where he was at that time, was not out of sight, but right in the doorway and pushing the trunk

(Testimony of E. B. Sisk.)

into that corner, which would be the southwest corner of that garage and in plain view.

Redirect Examination.

He was pushing the trunk west against the corner wall, and when the door would have been closed, would have been directly against the door of the garage which opened on the alley. The trunk was inside of the door at the time, but right on the door line, and he was pushing it against the wall, to the west wall. When I saw Mr. Driskill he was in that position (indicating), stooping with his hands on the trunk, and as I stopped he raised up. I did not say the trunk would protrude out beyond the door facing, when the door closed it would have been right in the corner of the garage. In other words, there was just room between the other articles for the trunk to be placed in the corner; the two doors were open. There was just room enough for the trunk to stick behind the other things, and the door.

Thereupon the witness was excused.

Testimony of Mrs. Louise C. Driskill, for Defendant.

Mrs. LOUISE C. DRISKILL was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination.

My name is Louise C. Driskill. I am the wife of the defendant. I recollect the occasion of a number of officers coming to my place some time in March

(Testimony of Mrs. Louise C. Driskill.)

or April. It was about, I should say, close to noon, about eleven o'clock. I was out in the yard, and at the time I was hanging up clothes, and I heard the telephone ring, and I called the boss to come answer the phone, but [64] I went in ahead to answer it, and when I got in the room, I come through the kitchen, and boss came after me, and went—by the time I got in the room the men were in the front hall; he came in before me. It seemed they had a paper there, supposed to be a search-warrant, but the number was not right, and Mr. Driskill just took and told them to go out, and to get off his property and out of his house. They had tried to push in, and he just talked and made a motion to exclude them all out, just brushed them out, and they went out then. Then they took Mr. Driskill and put him in the car, in the automobile, in the back alley. Then they asked my permission to telephone. Mr. Sisk did, and Mr. Driskill said no, he could not telephone, and then he changed his mind and said, "What do you want to telephone for?" and he said he wanted to call the Lightning Delivery. I did not in any way give them any permission to search the place. Mr. Driskill did not in my presence give them any permission to search the place; on the contrary, he said they should not. I was not constantly in the presence and hearing of Mr. Driskill at all times until he was placed under arrest and taken around to the car. I was there part of the time and part of the time I went in the house. I did not hear all of the conversations that took place

(Testimony of Mrs. Louise C. Driskill.)

in the house. At the time they first entered I was right there. The time they came the second time I was telephoning, I was at the telephone, and the door was shut, and they were waiting, Mr. Sisk and Mr. Weage, as I remember, were the only ones that were on the front porch waiting for me to finish talking. Then they knocked at the door. I opened the door. They said, "We have found these things, this stuff Mr. Driskill had," and asked me if there was a still in the house, and I said, "No, sir, there is no still here; never has been." And they said, "You could not refuse to let us in the house." Mr. Sisk said that. I didn't say anything at all. They said it would save us a trip from coming [65] back, and I said, "There was no still there and never has been"; those are the only words I used. They searched the house then; they said, "You could not refuse to let me in," and I opened the door, and they came on in; I didn't tell them to come in. Mr. Driskill was then out in the car. He had already been taken out at that time. And he made a motion to get out, and they pushed him back, and said he must not come. He was still protesting out there against them going through the house. He always did protest against them going through the house.

Cross-examination.

Mr. Sisk knocked at the door and said they had found some things. They did not say what they had found. He said they had found the stuff Mr. Driskill had in the back shed. When I spoke of

(Testimony of D. B. Driskill.)
someone as the "boss," that is Mr. Driskill. There wasn't anybody else there at that time with me except Mr. Driskill. My brother came later.

Thereupon the witness was excused.

Testimony of D. B. Driskill, in His Own Behalf (Recalled—Cross-examination).

D. B. DRISKILL was recalled and having been heretofore duly sworn, testified further as follows:

Cross-examination.

I testified on direct examination that I went over to the Luttner house that morning. To the best of my judgment I think that was eight-thirty or nine o'clock. I went over there to see something about some lattice work. When I went over there that time the door on the inside of the premises was not locked. There was no lock that morning. I can't say positively whether I was over there the day before or not; I had been working there off and on. I never did finish the house; they moved into it before I got it completed and I would paint one floor one day and—I was not busy painting my own house that day. I am not sure whether I was painting the day before on my place or not. I can't [66] remember being there the day before.

Thereupon the witness was excused.

WHEREUPON, both parties having closed upon the said issue upon said petition for restoration of the property and for restraining order, and the answer thereto, the Court made the following ruling and statement:

The COURT.—Is the matter submitted?

Mr. LANGSTON.—Yes.

The COURT.—Upon the matter of the introduction of this trunk and barrel, involving the right of search and seizure under the Fourth and Fifth Amendment to the Constitution, I will say that officers have no right at any time to search anybody's premises without his permission or without a search-warrant, and the search-warrant must be definite and certain and describe the premises searched as has been repeatedly held. There is, however, no intimation against the consideration of the Court and the jury in testimony of any property which was unlawfully in the possession of the gentleman, that is, if the Government is not a party to the infringement of the constitutional right. Inhibitions of these sections of the Constitution simply go to the right of public officers to invade the home of a party, and when that is done, of course, such testimony may not be used when procured by the wrong-doing of officials. If any other person wrongfully invades anybody's premises, they are amenable to the party under the general provisions of law, and if the Government should obtain possession of property unlawfully obtained by some other person to which the Government officials were not a party, there is no rule which would prevent under such circumstances the introduction of such property as testimony in the case. Now, this matter was fully considered by the Supreme Court of the United States [67] in the case of Bordeaux against McDowell. It has not been reported in the

Supreme Court Reporter, but is in the advance sheet filed on the first of June, 1921. In that case some parties actually broke into a person's office, blew open his safe, took out documents and papers and letters and files, and other matters, which showed conduct on the part of persons who seized documents which not only violated contractual rights of parties, but likewise showed that they had transgressed the laws of the United States, or state. The parties who stole these articles turned some of the articles over to the office of the Attorney General. Petition or action was started against the officials for the purpose of having these returned, and the Supreme Court of the United States held that the Government, not being a party to the transgression, there was no constitutional principle which required the Government to surrender the papers under such circumstances, but the parties had their remedy against the individuals who transgressed their rights, but so far as the Government was concerned, it would not require the Government to return the property, and it could be used as testimony. Now, in this case I observed yesterday, though I didn't think it was very material what did transpire in the house with relation to the discussion of the search-warrant and the wrong number on the search-warrant of the premises, I am still of that opinion, this garage in which these articles were found was not a part of the premises of the defendant; they belonged to the premises which had been leased to another party. At the time of the lease no garage was on those other premises; the garage was con-

structed upon those premises, and taking the most favorable view of the testimony so far as the defendant is concerned, he reserved the right to store some articles in this garage. The special agent of the department,—I do not recall his name,—testified yesterday that the defendant stated that was not his property. The defendant [68] denies that upon the stand. I am inclined to the view that this statement was made, taking all of the circumstances into consideration. Now, if he denied to the officers at the time that that was his premises, of course the officer had no reason to believe that the defendant had any right in that property, the officer then taking his testimony, and likewise the testimony of Mrs. Luttner, and the consent of Mrs. Luttner upon whose premises this garage is, removed the trunk and the barrel and the contents, now, then, the officer did not transgress any rule, he got the property from the person in whose possession it was, he violated no one's right. Now, in this petition for the return of the property, and in the testimony, there is no testimony before the Court that the defendant claims this to be his property. I was careful to listen to any claims of his of ownership, so there isn't anything before the Court to show that the defendant has even any right or interest in this property, in the trunk or the barrel, or any relation to it, another matter that bears upon the contention of the defendant and the Government, while it bears upon the matter I suggested yesterday as to the right to search the house. Now, this indictment being returned on the 27th of April, the property was

seized upon the 23d of April, 1921. Now, the defendant at no time asserted that that was wrongfully taken, or that any constitutional right of his was transgressed until the 24th day of October, 1921, the date when this case was set for trial, so that that would indicate that the testimony of the officers that permission to search the premises was obtained, to be true, and conceding both facts, that this garage may be considered as a part of the defendant's premises, the strong preponderance of the testimony of and circumstances discloses, brought out the contention on the part of the officers that testified that they were given permission to search the premises, but this property having been voluntarily delivered to the officers by the party in whose possession [69] it was, that is, I mean by that, by the party upon whose premises the garage was, and in which it was stored, and the defendant having conceded that that was not his garage, that he might not now contend that he has any right which was transgressed by the officers, and that this is wrongfully in the possession of the officers of the United States.

The motion, therefore, will be denied,—the objection to the admission of this property will be denied, and an exception may be noted. The cases that were called to my attention yesterday, United States against Slosser, and United States against Keeler, have no application to the facts disclosed in the petition, and the rule stated by the Supreme Court, and the facts in this case, to the facts in the case of Bordeax versus McDowell are, while not similar,

yet these facts come under the same general statement. You may proceed."

Thereupon the following proceedings were had:

Testimony of Fred A. Weage, for the Government. (Recalled).

FRED A. WEAGE was recalled and having been heretofore duly sworn, testified further as follows:

Direct Examination.

I took the trunk and the barrel that I found at this garage and brought them to the Federal Building, to the marshal's office, where they have been since in the marshal's custody, the United States marshal. I opened them and looked into them after I brought them to the building.

Q. What did you find in the trunk? A. The trunk contained—

Mr. PUGH.—If the Court pleases, I want to object to the introduction of the answer to this question, to the introduction of any testimony with regard to the contents of the trunk, the barrel, or any other property taken from the premises of the defendant, and upon these specific grounds set out in the motion [70] that has heretofore been filed and heard in this case.

The COURT.—Overrule the objection.

Mr. PUGH.—And I would like to have that objection understood as applying to further questions.

The COURT.—It is saved to you. Overrule the objection.

(Testimony of Fred A. Weage.)

Mr. PUGH.—And an exception to the Court's ruling.

Mr. LANGSTON.—Q. What did you find in the trunk?

And, in answer to the said question, the said witness was allowed over the objection of the attorney for the defendant, to state, and did state as follows:

"The trunk contained quite a quantity of empty pint bottles, and seven bottles filled, with the seals unbroken, of Saffel Whiskey, *snf ninr* bottles of tequila and two jars of white mule whiskey."

That the counsel for the defendant, David B. Driskill, did at the time of the introduction of the said testimony against the defendant, and in each instance of the offer thereof, insist that the said evidence so offered to be given by the plaintiff, to-wit, the contents of said trunk and barrel so obtained as heretofore shown in this bill of exception, was not admissible on account of having been procured and obtained by the United States Government unlawfully and in violation of the constitutional rights of the defendant, as set out in his aforesaid petition, which was and is hereby incorporated as a part of the defendant's objection to the introduction of the said testimony.

But his Honor, the said Judge, held and affirmed that the said evidence so offered to be given by the United States of America, as aforesaid, was good and admissible in law, and thereupon, the same was allowed to be given in evidence against this

defendant, to which ruling of his Honor, the said Judge, the defendant prayed a bill of exceptions in accordance with law and hereby presents the same.

Dated this 31st day of December, 1921.

JEREMIAH NETERER,
Judge. [71]

District Court of the United States for the District of Arizona.

PHOENIX—1323—C.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Bill of Exceptions No. 2.

BE IT REMEMBERED that on the 28th day of October, 1921, at a term of the said Court held at Phoenix, Arizona, in and for the District of Arizona, before his Honor, Jeremiah C. Neterer, Acting District Judge, the issue being joined in the above cause between the United States of America and David B. Driskill, the defendant, the same having been called for trial by the Court, with a jury duly empaneled, and the United States of America appearing by J. H. Langston, Assistant United States Attorney, and the defendant appearing in person and by Spencer B. Pugh, his attorney, and the jury having been empaneled and

sworn; and witnesses having already been introduced and the testimony having been concluded upon the petition of the defendant for the restoration of the property and for a restraining order, and the case having been called for trial upon the issue of the guilt or innocence of the defendant:

THEREUPON, the following proceedings were had, and hereinafter set out is the whole testimony and evidence adduced upon said issue up to the time that the Government rested and the motion hereinafter set out was made by the defendant through his counsel for a directed verdict, to wit: [72]

Testimony of Fred A. Weage, for the Government (Recalled).

FRED A. WEAGE was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination.

I took the trunk and the barrel that I found at this garage and brought them to the Federal Building, to the marshal's office, where they have been since in the marshal's custody, the United States marshal. I opened them and looked into them after I brought them to the building.

Q. What did you find in the trunk?

A. The trunk contained—

Mr. PUGH.—If the Court pleases, I want to object to the introduction of the answer of this question, to the introduction of any testimony with regard to the contents of the trunk, the barrel or any other property taken from the premises of the defendant, and upon these specific grounds set out

(Testimony of Fred A. Weage.)

in the motion that has heretofore been filed and heard in this cause.

The COURT.—Overrule the objection.

Mr. PUGH.—And I would like to have that objection understood as applying to further questions.

The COURT.—It is saved to you. Overrule the objection.

Mr. PUGH.—And an exception to the Court's ruling.

The trunk contained quite a quantity of empty pint bottles, and seven bottles filled, with the seals unbroken, of Saffel whiskey, and nine bottles of tequila, and two jars of white mule whiskey. White mule is distilled home brew, you might say, by ordinary distilling, and uncolored high proof, containing a large amount of alcohol. That is one of the bottles that was in the trunk, and also one of the bottles that was stolen from the Government warehouse.

Mr. PUGH.—I object to that statement, if the Court pleases.

The COURT.—That will be stricken; the jury will disregard it.

Plaintiff's Exhibit "B" is one of the bottles that was in the trunk. Plaintiff's Exhibit "C" is one of the jars of the white mule. There were two jars in the trunk. The barrel contained empty pint bottles including one empty bottle, that had [73] contained Sassel whiskey. That bottle is in the vault in our office. I will get it. That is the trunk that I brought to the Federal Building, and the con-

(Testimony of J. E. Wilkey.)

tents. That is the barrel, and the contents of the barrel.

Mr. LANGSTON.—I will ask to have the trunk and barrel designated as exhibits.

The COURT.—They may be marked.

(Trunk and barrel marked Plaintiff's Exhibits "D" and "E.")

Mr. PUGH.—If the Court pleases, I object to that. I object to the barrel and contents. I understand there is no charge of having transported empty bottles and barrels and I think it is not material in this case, and it encumbers the record.

The COURT.—Denied.

Thereupon the witness was excused.

Testimony of J. E. Wilkey, for the Government.

J. E. WILKEY was called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

Direct Examination.

I am a special agent of the Department of Justice. I have seen Plaintiff's Exhibit "A" for identification before. About April the 21st, I found this trunk in a garage. I took this bottle over and had it analyzed for alcoholic content, to a chemist by the name of Dr. Goss in the Physicians' and Surgeons' building, Phoenix. I have seen Exhibit "B" before, under the same circumstances. The same as to Exhibit "C" I examined the trunk as to contents. It contained two jars of white mule. They were in the trunk. And this here tequila, nine bottles of tequila, and seven bottles of Saffel whis-

(Testimony of J. E. Wilkey.)

key, I found empty pint bottles in the barrel. There was one empty bottle, whiskey bottle, found [74] in the bottom of the barrel, and it bore a Sassel label. There was a bottle like this; I didn't mark it; I didn't mark my initials on it; there was a bottle like this, a Saffel bottle.

Cross-examination.

I found this stuff on Mrs. Luttner's premises, in Mrs. Luttner's garage, or premises.

Thereupon the witness was excused.

Testimony of Mrs. W. H. Luttner, for the Government.

MRS. W. H. LUTTNER was called as a witness on behalf of the plaintiff and after being duly sworn, testified among other things:

I reside at 2245 West Adams; I know the defendant Driskill; know where he lives; I live opposite the alley; opposite his house across the alley; I rent those premises from Mr. Driskill; Mr. Driskill constructed the garage or building and since it has been constructed I have had possession of part of it. I have used it as a storehouse for our furniture, and I keep jellies and different things out there. We do not keep any automobile. I remember an occasion of Mr. Sisk and some other officers coming there. He asked me whether I cared whether he moved that trunk that was near the side and I said no, I did not care, because it did not belong to me, and I did not know who it belonged to, and he could take it. He said he found a barrel with some

(Testimnoy of Mrs. W. H. Luttner.)
bottles in it and I said he could take them too because it did not belong to me. Mr. Driskill had said something to me about taking something in there; it was either on the same morning or on the morning before; he asked me whether he could put a trunk in the shed and I said he could; he asked me whether I thought there was room enough and I said yes, I thought there was. That was before the trunk was put in there. The trunk and the barrel and the bottles were taken away that day. I do not know by whom.

The witness was excused. [75]

Testimony of E. B. Sisk, for the Government.

E. B. SISK testified on behalf of the plaintiff among other things, as follows:

I went there in my car; I stopped that car out there around in the alley in the rear of Mr. Driskill's premises, I should say twenty-five feet; I should say east of the garage, and on the same side of the alley as his garage. I saw from the place where I was in the car, saw him in that building from there fooling with a trunk—both doors of that garage that he was in, the garage across the alley from him, and was not over a foot from the alley line where we found the trunk, and where he was at that time, and was not out of sight but right in the doorway pushing the trunk into that corner which would be the southwest corner of that garage and in plain view.

And on redirect said: I did not say the trunk *protrude* out beyond the door facing; when the

(Testimony of Fred A. Weage.)
door closed it would have been right in the corner of the garage. In other words, there was just room enough for the trunk to stick behind the other things and the door.

Testimony of Fred A. Weage, for the Government (Recalled).

FRED A. WEAGE was recalled, and having been theretofore duly sworn, testified further as follows:

Direct Examination.

Plaintiff's Exhibit "F" came out of that barrel, the barrel marked Plaintiff's Exhibit "E."

Cross-examination.

I took the bottle out. I did not have anything in it at that time.

Thereupon the witness was excused.

Testimony of H. L. Goss, for the Government.

H. L. GOSS was called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:

Direct Examination.

My name is H. L. Goss. I have made an analysis of the contents of the bottle marked Plaintiff's Exhibit "A." [76] I find that this sample designated "A" contains ethol alcohol percentage, one hundred and one proof spirits, corresponding to about fifty per cent ethol alcohol, fifty per cent by volume of alcohol. I have made an analysis of Plaintiff's Exhibit "B." Exhibit "C," my mark, this exhibit "C" containing ninety-five proof spirits, corresponding to about forty-two per cent ethol

(Testimony of H. L. Goss.)

alcohol by volume. It is somewhat hard to say what sort of liquor it is, other than it is alcohol containing a small amount of organic matter; I would hardly know how to designate that. I analyzed Exhibit "C," my mark B. I found this to contain ninety-six and four-tenths proof spirits, corresponding to about forty-eight per cent ethol alcohol by volume, looks very much like a poor grade of white mule. These papers are reports of analysis made upon the samples which have been offered, simply usual routine laboratory reports. I think Exhibits "A," "B," and "C" could be used as alcoholic beverages.

Thereupon, the witness was excused and the Government rested.

The contents of the trunk were admitted in evidence.

WHEREUPON, the following motion as a basis of the defendant's second assignment of error herein was made by the defendant through his counsel:

"Mr. PUGH.—If the Court pleases, the defendant moves that the Court should—moves the Court to give the jury a peremptory instruction to find for the defendant on the ground, on both counts of the indictment, upon the ground that insufficient evidence has been introduced to make out a *prima facie* case either of the transportation or the possession of intoxicating liquor, and that the defendant be discharged.

The COURT.—Denied. Proceed."

WHEREUPON, the following testimony was offered by the defendant.

Testimony of W. H. Luttner, for Defendant.

W. H. LUTTNER was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination.

My name is W. H. Luttner. I have testified in this case [77] before. I have partial possession of a garage or storehouse that has been testified about in this case. I can't say positively whether I have seen that trunk before. I have no information as to who the trunk belongs to, or who put it in the garage. I know of John Houston putting a trunk in there.

Mr. LANGSTON.—Just a minute, if the Court pleases. I object to this question, it being incompetent, irrelevant and immaterial, and not tending to prove any issues in the case. He said a trunk, and we are not concerned about other things.

The COURT.—Sustain the objection.

Mr. PUGH.—If the Court pleases, my purpose is to show that—

The COURT.—I understand the purpose. Confine it to this trunk.

The WITNESS.—"I don't think John Houston put this trunk in the garage. I do not know whose trunk it is. I have had occasion to observe the location of the garage, and the back doors of that garage or storehouse, on the back part of my premises. I have had occasion to observe the position of the doors. The back side of the garage on my premises faces to the south. As near as I know it

(Testimony of W. H. Luttner.)
is exactly in line north and south. The alley runs east and west. The alley is approximately twenty feet wide, probably more; I don't know. There is one double door on my garage, on that garage opening into the alley. Those doors open outward toward the alley, one to either side.

Thereupon the witness was excused.

Testimony of Charles L. Vogt, for Defendant.

CHARLES L. VOGT was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination.

My name is Charles L. Vogt. I am a brother-in-law of the defendant. I have had occasion lately to examine the premises with reference to the location of the Luttner garage on the alley back of Mr. Driskill's house. The back of that garage faces to the south. The alley runs east and west. The doors of the garage open to the south. I was at the Driskill premises on the day in [78] April when he was arrested and some search was made there. At that time I noticed the location of the Government car, automobile that stopped in the alley. It was located about thirty-five or forty feet from the door of this Luttner garage or storehouse.

Q. Now at the place that the car was located, you may state whether you have made any tests or seen any made to determine whether or not from any portion of the position where that car was located,

(Testimony of D. B. Driskill.)

that with the doors of the garage open, a view would be possible into the inside of the garage.

Mr. LANGSTON.—That is objected to as calling for a conclusion of the witness.

The COURT.—That is the same thing I ruled on a while ago.

Thereupon the witness was excused.

Testimony of D. B. Driskill, in His Own Behalf (Recalled).

D. B. DRISKILL was called as a witness in his own behalf, and having been first duly sworn, testified as follows:

Direct Examination.

My name is D. B. Driskill. I am the defendant in this case. The trunk here marked Exhibit "B" in this case is not my trunk. I have never had possession of that trunk. None of the contents were mine. I have never touched, seen or handled any of the contents of that trunk prior to the time it was taken by the Government. I might have touched the trunk a while ago while I was passing it. I have never moved that trunk or any of its contents. I have never had possession of any of the alleged intoxicating liquor marked as exhibits. I never transported any of that liquor at any place. I never did see any of it prior to the time I came here.

Cross-examination.

I did not see this trunk there in the garage that

(Testimony of D. B. Driskill.)

I know of, nor that barrel that I know of. I passed through the garage there [79] frequently, passing from my place over to Mr. Luttner's place. I never saw the trunk to identify it. There are several other trunks in this garage, I suppose; I can't give you the exact amount, five or six or more. There wasn't no trunk sitting just inside the back door between the door and the corner at that time. There was a barrel there at that time, they had some fruit jars, fruit in it, Mrs. Luttner's fruit. I think there in the corner, the southwest corner. That would be the corner to the southwest of the door. I saw that. That was there that morning. Nothing was between that barrel and the door, not a thing.

Thereupon the witness was excused, and the defendant rested.

The Court in its instructions instructed the jury that there is not testimony to show that the defendant transported liquor, and instructed to return a verdict of not guilty as to the transportation, which was done.

I, the undersigned, Judge before whom the foregoing cause was tried, do hereby certify that the statement contained "Bill of Exception No. 1" and "Bill of Exception No. 2" contains the substance of the testimony submitted upon the issues raised upon the trial together with the objections made and the rulings of the Court thereon.

Dated this 31 day of Dec. 1921.

JEREMIAH NETERER,
Judge Presiding. [80]

In the District Court of the United States for the District of Arizona.

No. 1323—C.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant,

Affidavit of Service of Bills of Exception.

State of Arizona,
County of Maricopa,—ss.

Spencer B. Pugh, being duly sworn, on his oath, deposes and says that he is the attorney for the defendant in the above-entitled cause; that on the 29th day of November, 1921, he served the attached bills of exception numbered 1 and 2, by leaving true copies thereof with Mr. J. H. Langston, Assistant United States District Attorney, at the office of the United States District Attorney, at Phoenix, Arizona.

That no amendments whatsoever have been proposed by the said United States District Attorney, and no objections presented to the form or substance of the same or served upon affiant.

SPENCER B. PUGH.

Subscribed and sworn to before me this 19th day of December, 1921.

My commission expires Sept. 5, 1922.

L. J. COX,
Notary Public. [81]

[Endorsements]: Phoenix—1323-C. In the District Court of the United States for the District of Arizona. The United States of America, Plaintiff, vs. David B. Driskill, Defendant. Bill of Exceptions. [82]

In the District Court of the United States, District of Arizona.

No. 1323.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Petition for Writ of Error.

Now comes David B. Driskill, defendant herein, by his attorney, and says that on the 2d day of November, 1921, the Court entered judgment herein against this defendant, in which judgment and proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be

sent to the Circuit Court of Appeals aforesaid.

SPENCER B. PUGH,
Attorney for Defendant. [83]

[Endorsements]: No. 1323. U. S. Court, District of Arizona. United States of America, vs. David B. Driskill, Defendant. Petition for Writ of Error. Filed Nov. 20, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. Spencer B. Pugh, Attorney for Defendant. [84]

In the District Court of the United States in and for the District of Arizona.

No. 1323.

UNITED STATES OF AMERICA,

vs.

DAVID B. DRISKILL,

Defendant.

Assignment of Errors.

Now comes David B. Driskill, defendant in the above-entitled cause, by his attorney, in connection with his petition for a writ of error herein, and makes the following assignment of errors which he alleges occurred upon the trial of said cause:

1. The trial Court erred in admitting incompetent evidence to this defendant's prejudice, in this, to wit:

The Court admitted in evidence certain bottles of alleged intoxicating liquor, being one bottle labeled as "saffel," one bottle "tequila," and a

quantity of alleged "white mule," and any and all liquor, bottles and receptacles introduced in evidence in said cause, same having been objected to by the defendant upon the ground that all of said liquor and property had been procured and obtained by the United States Government unlawfully from the home and premises and dwelling of the defendant without a search-warrant as required by law and in violation of the constitutional rights of the defendant as set forth in the petition of the defendant theretofore filed in said cause and one of the files therein.

2. That the trial Court erred in overruling and denying the motion of the defendant, made at the close of the case for the Government, to direct a verdict for the defendant upon the second count and each of the counts of the indictment herein, said motion being made upon the ground that sufficient evidence had not been presented by the Government to make out a *prima facie* case or to justify or support a verdict of guilty.

3. That the trial Court erred in denying the motion for a new trial on behalf of defendant.

SPENCER B. PUGH,
Attorney for Defendant. [85]

[Endorsements]: No. 1323. United States District Court, in and for the District of Arizona. United States of America vs. David B. Driskill, Defendant. Assignment of Errors. Filed Nov. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing,

Chief Clerk. Spencer B. Pugh, Attorney for Defendant. [86]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, David B. Driskill, as principal, and Louise Driskill, W. C. Daniel and Dora Daniel, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Fifteen Hundred Dollars ($1500.00), to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Dated and signed this 2d day of November, 1921.

Whereas, lately, at the October Term, 1921, of the United States District Court of the District of Arizona, in a suit pending in said court between the United States of America, plaintiff, and David B. Driskill, defendant, a judgment was rendered and sentence pronounced against the said David B. Driskill, and the said David B. Driskill has obtained a writ of error from the United States Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, sixty days

from and after the date of said citation, which citation has been duly served.

NOW, the condition of the above obligation is such that, if the said David B. Driskill shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and shall prosecute said writ of error and shall abide by and obey all orders made by the United States Court of Appeals for the Ninth Circuit in said cause and shall pay any fine and costs imposed by the judgment of the District Court against him, and shall surrender himself in execution of the judgment and sentence against him appealed from as the Court may direct, if the judgment and sentence against him shall be affirmed or the writ of error is dismissed; and if he shall appear for trial in the District [87] Court of the United States for the District of Arizona on such day or days as may be appointed for a retrial of the said cause by said District Court, and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit; then the above obligation to be void; otherwise to remain in full force, virtue and effect.

DAVID B. DRISKILL,
Principal.
LOUISE C. DRISKILL.
A. C. DANIEL.
DORA DANIEL.

Approved this 2d day of Nov. 1921.

Judge.

United States of America,
District of Arizona,—ss.

W. C. Daniel, Dora Daniel and Louise C. Driskill, the sureties in the within undertaking, being duly sworn, each for himself and not one for the other, says that he, or she, is worth the sum of Fifteen Hundred Dollars ($1500.00) over and above all his or her just debts and liabilities, and over and above all property exempt by law from execution and forced sale, and that he, or she, is a resident and freeholder within the state of Arizona.

LOUISE C. DRISKILL.
W. C. DANIEL.
DORA DANIEL.

Approved as to sureties, November 2d, 1921.
PATRICK D. MADDEN.
Deputy Clerk.

Subscribed and sworn to before me this 2d day of November, A. D. 1921.

[Seal] PATRICK D. MADDEN,
Deputy Clerk U. S. District Court.

O. K. as to form.

11/2/21.
JOHN H. LANGSTON,
Asst. U. S. Atty. [88]

[Endorsements]: No. 1323. U. S. District Court, District of Arizona. U. S. of America vs. David B. Driskill, Defendant. Appearance Bond on Writ of Error. Filed Nov. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. Spencer B. Pugh, Attorney for Defendant. [89]

Writ of Error from Circuit Court of Appeals to United States District Court for the District of Arizona (Copy).

To the Honorable Judge of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings as also in the rendition of the judgment, of a cause which is in the District Court before you, between the United States, as plaintiff, and David B. Driskill as defendant, manifest error, it is alleged, has happened, to the great damage of the said David B. Driskill, defendant, as by his complaint appears, we, being willing that error, if any, should be duly corrected, and full, speedy justice done to the parties aforesaid in this behalf, do command, if judgment be given therein, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with the things concerning the same, to the United States *Circuit of* Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 2d day of Jan-

uary, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 2d day of November, 1921, A. D., and in the one hundred and forty-fifth year of the Independence of the United States.

C. R. McFALL,
Clerk United States District Court, District of Arizona.

By Clyde C. Downing,
Chief Deputy.

Allowed:

JEREMIAH NETERER,
Judge. [90]

Writ of Error from Circuit Court of Appeals to United States District Court for the District of Arizona (Original).

To the Honorable Judge of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings, as also in the rendition of the Judgment, of a cause which is in the District Court before you, between the United States, as plaintiff, and David B. Driskill as defendant, manifest error, it is alleged, has hap-

pened, to the great damage of the said David B. Driskill, defendant, as by his complaint appears, we, being willing that error, if any, should be duly corrected, and full, speedy justice done to the parties aforesaid in this behalf, do command, if judgment be given therein, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with the things concerning the same, to the United States *Circuit of* Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 2d day of January, ——, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 2d day of November, 1921, A. D., and in the one hundred and forty-fifth year of the Independence of the United States.

C. R. McFALL,
Clerk United States District Court, District of Arizona.

By Clyde C. Downing,
Chief Deputy.

Allowed:

JEREMIAH NETERER,
Judge. [90½]

[Endorsed]: No. 1323. U. S. District Court, District of Arizona. U. S. of America vs. David B. Driskill, Defendant. Writ of Error. Filed Nov. 2d, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [91]

Return of Writ of Error.

United States District Court,
For the District of Arizona,—ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Ninth Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this the 18th day of January, A. D. 1922.

[Seal] C. R. McFALL,
Clerk United States District Court for District of Arizona.

By Clyde C. Downing,
Chief Deputy. [92]

[Endorsements]: No. 1323. U. S. District Court District of Arizona. U. S. of America vs. David B. Driskill, Defendant. Writ of Error. Filed Nov. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [93]

In the District Court of the United States, in and for the District of Arizona.

No. 1323.

THE UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Citation to Writ of Error (Copy).

To the United States of America, Defendant in Error.

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, California, on the 2d day of January, 1922, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the District of Arizona, wherein David B. Driskill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Circuit Judge of the United States, within said Circuit, this 2d day of November, A. D. 1921.

JEREMIAH NETERER,
U. S. Dist. Judge.

Service of the above citation accepted this —— day of November, 1921, on behalf of the U. S. Government.

_____,
U. S. Attorney.

[Endorsements]: Filed Nov. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

[Seal] Attest: C. R. McFALL,
Clerk.
By Clyde C. Downing,
Chief Deputy Clerk. [94]

In the District Court of the United States in and for the District of Arizona.

No. 1323.

THE UNITED STATES OF AMERICA
vs.
DAVID B. DRISKILL,
Defendant.

Citation to Writ of Error (Original).

To the United States of America, Defendant in Error.

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of appeals for the Ninth Circuit, to be held in the City of San Francisco, California, on the 2d day of January, 1922, pursuant to a writ of error filed in the Clerk's Office of the District Court of

the United States for the District of Arizona, wherein David B. Driskill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM H. TAFT, Circuit Judge of the United States, within said Circuit, this 2d day of November, A. D. 1921.

JEREMIAH NETERER,
U. S. Dist. Judge.

Service of the above citation accepted this —— day of November, 1921, on behalf of the U. S. Government.

_____,
U. S. Attorney.

[Seal] Attest: C. R. McFALL,
Clerk.
By Clyde C. Downing,
Deputy Clerk. [95]

Filed Nov. 2d, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

In the District Court of the United States for the District of Arizona.

No. C–1323—PHOENIX.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Praecipe for Transcript of Record.

The clerk of this court is hereby directed to prepare and certify a transcript of the record in the above-entitled case for the use of the United States Circuit Court of Appeals for the Ninth Circuit, by including therein the following:

1. Indictment.
2. Motion to restore property.
3. Motion to strike the same and order thereon.
4. Answer thereto.
5. Verdict and judgment.
6. Motion for new trial.
7. Petition for writ of error.
8. Assignment of errors.
9. Citation thereto, and order thereon.
10. Bail bond pending writ of error.

—and such other papers, records and orders filed and made in connection with the above-entitled case.

Dated this 10th day of Nov. 1921.

SPENCER B. PUGH,
Attorney for Plaintiff in Error.

Service of the within praecipe of record and receipt of a copy is hereby admitted this 10th day of November, 1921.

THOMAS A. FLYNN,
United States Attorney.
By Jos. M. Holub,
Asst. U. S. Attorney. [96]

[Endorsements]: In the District Court of the United States for the District of Arizona. No.

C–1323. United States of America, Plaintiff, vs. David B. Driskill, Defendant. Praecipe for Record.

[Endorsements]: Filed Nov. 10, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. Spencer B. Pugh, Attorney for Plaintiff. [97]

In the District Court of the United States for the District of Arizona.

No. 1323–C—(PHOENIX).

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Order Extending Time to File Bill of Exceptions and Transcript of Record (Dated December 2, 1921).

This cause coming on to be heard on this 2d day of December, 1921, upon the motion of the defendant for an extension of time in which to file bills of exceptions and transcript in the office of the Clerk of the United States Court of Appeals,—

IT IS ORDERED that the time in which the above-named defendant may file his bills of exception and transcript with the Clerk of the United States Court of Appeals for the Ninth Circuit is hereby extended for the period of thirty days from this date.

Done at Tucson, Arizona, this second day of December, A. D. 1921.

WM. H. SAWTELLE,

Judge United States District Court for the District of Arizona. [98]

[Endorsements]: No. 1323–C (Phoenix). In the United States District Court for the District of Arizona. The United States of America, Plaintiff, vs. David B. Driskill, Defendant. Order Extending Time for Filing Bill of Exceptions. Filed Dec. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [99]

In the District Court of the United States for the District of Arizona.

No. 1323–C.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant.

Order Extending Time to File Bill of Exceptions and Transcrip of Record (Dated January 3, 1922).

This cause coming on to be heard on this 2d day of January, 1922, upon the motion of the above-named defendant for an extension of time in which to file bills of exception and transcript on appeal

in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit,—

IT IS ORDERED that the time within which the above-named defendant may file and cause to be filed his bills of exception and transcript with said United States Court of Appeals for the Ninth Circuit with the Clerk thereof be, and the same is, hereby extended for a period of 15 days from the date hereof.

Done at Phoenix, Arizona, this third day of January, 1922.

FRANK S. DEITRICH,
Judge Presiding in United States District Court for the District of Arizona. [100]

[Endorsements]: No. 1323–C. United States District Court in and for the District of Arizona. United States of America, Plaintiff, vs. David B. Driskill, Defendant. Extension of Time for Filing Bills of Exception and Transcript on Appeal. Filed Jan. 3, 1922. C. R. McFall, Clerk. By P. D. Madden, Deputy. Spencer B. Pugh, Atty. for Defendant. [101]

In the District Court of the United States for the District of Arizona.

No. C–1323—(PHOENIX).

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Order Extending Time to File Transcript of Record (Dated January 17, 1922).

It appearing that the extensions heretofore granted will be insufficient within which the Clerk of the above court can prepare and forward for filing to the United States Circuit Court of Appeals for the Ninth Circuit, the transcript of record called for in the praecipe directed to the said Clerk, the said record being submitted upon writ of error allowed in the above cause,—

IT IS HEREBY ORDERED that the time within which said record shall be filed with the Clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, be extended for a period of five days from January 17th, 1922, the date upon which the time would expire if an extension were not made thereof.

Dated this 17th day of January, A. D. 1922.

FRANK S. DIETRICH,

Judge (Presiding) of the United States District Court, District of Arizona.

Filed Jan. 17, 1922. C. R. McFall, Clerk. By Clyde C. Downing, Deputy. [102]

In the District Court of the United States for the District of Arizona.

No. C–1323 (PHOENIX).

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the case of the United States of America, Plaintiff, vs. David B. Driskill, Defendant, said case being numbered C–1323 (Phoenix) on the Criminal Docket of said court.

I further certify that the foregoing 103 pages, numbered from 1 to 103, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such clerk.

And I further certify that there is also annexed

to said transcript the original writ of error and the original citation issued in said cause.

I further certify that the cost of the preparing and certifying to said record, amounting to Thirty and no/100 Dollars ($30.00), has been paid to me by the above-named defendant.

WITNESS my hand and the seal of said court this 14th day of January, 1922.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona.

By Clyde C. Downing,
Chief Deputy Clerk. [103]

[Endorsed]: No. 3829. United States Circuit Court of Appeals for the Ninth Circuit. David B. Driskill, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed January 20, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.